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# New Jersey Supreme Court

PASSAIC COUNTY.

## Notice of Appeal.

(Filed June 24, 1941.)

JAMES RIZIO, JR., an infant, by  
his next friend, James Rizio,  
Sr., and JAMES RIZIO, SR., indi-  
vidually,

Plaintiffs,

*vs.*

PUBLIC SERVICE ELECTRIC & GAS  
COMPANY, a corporation of the  
State of New Jersey,

Defendant.

10

Action at Law.

20

*To Vincent C. Duffy, Esq., Attorney for Plain-  
tiffs, 45 Church Street, Paterson, New Jersey:*

*Sir:*

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

Dated: June 19, 1941.

30

HENRY H. FRYLING,  
Attorney of Defendant.

(Endorsed)

Service of a copy of the within Notice of Appeal  
is herewith acknowledged this 19th day of June,  
1941.

VINCENT C. DUFFY,  
Attorney of Plaintiffs.

40

The defendant was duly summoned.

**Complaint.**

(Filed November 13, 1939.)

NEW JERSEY SUPREME COURT,

PASSAIC COUNTY.

10

JAMES RIZIO, JR., an infant, by  
his next friend, James Rizio,  
Sr., and JAMES RIZIO, SR., indi-  
vidually,

Plaintiffs,

*vs.*

20

PUBLIC SERVICE ELECTRIC & GAS  
COMPANY, a corporation of the  
State of New Jersey,  
Defendant.

Action at Law.

Plaintiffs, by their attorney, Vincent C. Duffy,  
complain of the defendant as follows:

FIRST COUNT.

30 1. Plaintiff, James Rizio, Jr., an infant, resid-  
ing in the City of Paterson, in the County of  
Passaic and State of New Jersey, prosecutes this  
suit by his next friend, James Rizio, Sr., who has  
been duly empowered thereto, and says that he is  
an infant under the age of twenty-one years, to  
wit: of the age of ten years.

40 2. On or about the 10th day of April, 1939, and  
prior thereto, the defendant, Public Service Elec-  
tric & Gas Company, irrespective of any question  
of negligence, was the owner of the automobile  
hereinafter mentioned.

*Complaint.*

3. On or about the 10th day of April, 1939, John K. Russell, irrespective of any question of negligence, was the duly authorized servant, agent and/or employee of the defendant, Public Service Electric & Gas Company.

4. On or about the 10th day of April, 1939, John K. Russell was the operator of a certain automobile which was being operated in an easterly direction on and along Twentieth Avenue, in the City of Paterson, County of Passaic and State of New Jersey. 10

5. On or about the aforementioned date, the defendant, Public Service Electric & Gas Company, through its duly authorized servant, agent and/or employee, operated the said automobile in a general easterly direction on and along Twentieth Avenue, in the City of Paterson, as aforesaid, in a careless, negligent and improper manner, in that it approached the intersection of Dover Street and Twentieth Avenue without giving any sign, signal or warning of its approach; in that it was operated at a fast, excessive and unlawful rate of speed; in that it was operated with poor and defective brakes, which condition had existed for a long time; in that it was operated without the proper safety devices to insure the proper stopping of the vehicle; in that it was operated without being under full control of the operator; and further in that it was improperly checked, steered and guided so that by reason whereof it ran into and upon the plaintiff, James Rizio, Jr., who was lawfully on the highway at the intersection of Dover Street and Twentieth Avenue, striking him with such force and violence as to severely injure him. 20  
30  
40

*Complaint.*

6. As a result of the premises aforesaid, the plaintiff, James Rizio, Jr., underwent great pain and suffering, has been and will be in the future, for a long period of time, prevented from attending to his daily tasks and duties, was rendered sick, sore, lame and diseased, disordered, wounded and in the future will continue likewise.

10

7. By reason of the premises, the plaintiff, James Rizio, Jr., sustained the following injuries: he suffered and sustained severe cuts, contusions, and abrasions about the entire body and especially about his head; he suffered and sustained severe internal injuries; he suffered and sustained an internal squint of the left eye; he suffered and sustained a paralysis of the left external rectus muscle; he suffered and sustained an internal injury of the skull; he suffered and sustained a diplopia of vision; and he suffered and sustained severe and permanent shock to his nerves, suffered and continues to suffer from loss of sleep and loss of appetite, severe headaches; suffered numerous abrasions and lacerations about the face, neck, head, arms and legs; suffered numerous and severe contusions and bruises of the legs, arms and body, all of which will continue for a long time to come in the future.

20

30

WHEREFORE, James Rizio, Jr., by James Rizio, Sr., his next friend, demands as damages on this First Count the sum of Twenty-five Thousand (\$25,000.00) Dollars together with costs and disbursements of suit.

## SECOND COUNT.

1. Plaintiffs repeat paragraphs 1, 2, 3, 4, 5, and 6 of the First Count as though the same were herein repeated verbatim and set forth at length.

40

*Complaint.*

2. At the time of the committing of the grievances hereinbefore mentioned, plaintiff, James Rizio, Sr., was and still is the father of the infant plaintiff, James Rizio, Jr.

3. By reason of the premises aforesaid, plaintiff, James Rizio, Sr., has been obliged to lay out and expend large sums of money for hospital bills, doctors, nurses, X-rays, medicines, etc., in an effort to cure his said son of the injuries he sustained and in the future will continue likewise. 10

4. As a result of the premises aforesaid, plaintiff, James Rizio, Sr., has been deprived of the society and services of his said son, and in the future will continue to be so deprived.

WHEREFORE, plaintiff, James Rizio, Sr., will claim of the defendant as damages on this Second Count the sum of Five Thousand (\$5,000.00) Dollars, together with costs and disbursements of suit. 20

VINCENT C. DUFFY,  
Attorney for Plaintiffs.

30

40

**Answer.**

(Filed December 7, 1939.)

NEW JERSEY SUPREME COURT  
PASSAIC COUNTY.

10

JAMES RIZIO, JR., an infant, by  
his next friend, James Rizio,  
Sr., and JAMES RIZIO, SR., indi-  
vidually,

Plaintiffs,

*vs.*

20

PUBLIC SERVICE ELECTRIC & GAS  
COMPANY, a corporation of the  
State of New Jersey,

Defendant.

Action at Law.

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

## FIRST COUNT.

30

1. It has no knowledge or information of the allegations contained in paragraph one sufficient to form a belief.

2. It admits the allegations contained in paragraphs two, three, and four.

3. It denies the allegations contained in paragraphs five, six and seven.

## SECOND COUNT.

40

1. In answer to paragraph one it repeats its answers to paragraphs one, two, three, four, five and six of the First Count.

*Answer.*

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

3. It denies the allegations contained in paragraphs three and four.

## FIRST DEFENSE TO FIRST AND SECOND COUNTS.

10

It avers that the negligence of the infant plaintiff, James Rizio, Jr., contributed to the happening of the said alleged accident in that he negligently and carelessly exposed himself to the risk of such an accident and neglected to take precaution or to exercise care to guard and protect himself against such an accident. Moreover, at the time and place mentioned in the complaint, he was conducting himself in a careless, negligent and reckless manner and was not exercising care or taking proper precautions, and that he carelessly, negligently and recklessly placed himself in a position of danger while the automobile was in such position as to endanger his safety.

20

## SECOND DEFENSE TO FIRST AND SECOND COUNTS.

It avers that the sole and proximate cause of the said alleged accident was the negligence of the infant plaintiff, James Rizio, Jr., in that he negligently and carelessly exposed himself to the risk of such an accident and neglected to take precautions or to exercise care to guard and protect himself against such an accident. Moreover, at the time and place mentioned in the complaint he was conducting himself in a careless, negligent and reckless manner and was not exercising care or taking proper precautions, and that he carelessly, negligently and recklessly placed himself in a position of danger while the automobile was in such position as to endanger his safety.

30

40

HENRY H. FRYLING,  
Attorney of Defendant.

**Reply.**

(Filed December 11, 1939.)

NEW JERSEY SUPREME COURT  
PASSAIC COUNTY.

10

JAMES RIZIO, JR., an infant, by  
his next friend, James Rizio,  
Sr., and JAMES RIZIO, SR., indi-  
vidually,

Plaintiffs,

*vs.*

PUBLIC SERVICE ELECTRIC & GAS  
COMPANY, a corporation of the  
State of New Jersey,

20

Defendant.

Action at Law.

Plaintiffs, by way of Reply to the Answer filed  
by the defendant, say that:

1. They deny each and every allegation con-  
tained in the First Defense to First and Second  
Counts.

30

2. They deny each and every allegation con-  
tained in the Second Defense to First and Second  
Counts.

VINCENT C. DUFFY,  
Attorney for Plaintiffs.

40



*James Rizio, Jr., for Plaintiff—Direct.*

Mr. Duffy: At this time, with the Court's permission, I would like to offer the demand for interrogatories and the answers to the interrogatories.

10 Mr. Fryling: I have no objection, but I think the purpose is to establish ownership and operation, and I will admit that on the record.

The Court: I notice from the pleadings that agency, ownership, and operation are admitted.

Mr. Fryling: It is admitted right in the pleadings.

Mr. Duffy: I would still prefer to offer them.

Mr. Fryling: I have no objection.

(Papers marked Exhibits P-1 and P-2 in Evidence.)

20 (Mr. Duffy read Exhibits P-1 and P-2 to the jury.)

---

JAMES RIZIO, JR., called.

By the Court:

15 Q. James, which school do you go to? A. School 30

Q. Whereabouts? A. Sandy Hill Park.

Q. Here in Paterson? A. Yes.

Q. How old are you? A. Twelve, going on thirteen on June 5th.

Q. Do you remember this accident that you had back in April, 1939? A. Yes.

Q. Do you know why you are being called now here in this court? A. To tell the truth.

Q. To do what? A. To tell the truth.

40 Q. To tell the truth. Do you know what would happen to you if you didn't tell the truth? A. Yes.

*James Rizio, Jr., for Plaintiff—Direct.*

Q. What do you think would happen to you? A. I wouldn't go to Heaven.

Q. You wouldn't go to Heaven. Do you go to Sunday school? A. No.

Q. Or church? A. Yes.

Q. Which church do you go to? A. St. Anthony's.

10

Q. And you feel that if you don't tell the truth after your hand is put on that Bible and you call God to witness what you are saying, what will happen to you? A. I wouldn't go to Heaven.

Q. How old do you say you are now? A. Twelve, going on thirteen.

Q. When were you twelve years old? A. Last June the 5th.

Q. Last June 5th? A. 1940.

20

The Court: I think this witness is competent to testify under oath.

(The witness was thereupon duly sworn.)

*Direct examination by Mr. Duffy:*

Q. James, when I ask you questions will you talk loud enough so that I can hear it, in order that the man over here can hear, too? A. Yes.

Q. What is your full name? A. James Junior Rizio.

30

Q. And where do you live, James? A. 89 Martin Street.

Q. How old are you now? A. Twelve.

Q. On April 10, 1939, how old were you? A. Ten.

Q. What school do you go to? A. School number 15.

Q. And where is that, James? A. Sandy Hill Park.

Q. In Paterson? A. Yes.

40

*James Rizio, Jr., for Plaintiff—Direct.*

Q. Now, do you remember the day of April 10, 1939? A. Yes.

Q. Do you remember being on Twentieth Avenue in the City of Paterson? A. Yes.

Q. Now, did anything unusual happen that day? A. I was hit by a car.

10 Q. Will you please tell to Judge Wolber and these members of the jury just what happened? A. We were playing on Martin Street and we went over to Dover Street. We were going to—we were going to play with Billy Winterberg, so then we went across the street. We went three feet from the car out from the gutter, near the left headlight, in front of the left headlight of the car, of a parked car. I first looked to my left and there were no cars coming. Then I looked to my right  
20 and I seen an old truck passing. We waited for this truck for about five seconds, then I started to cross.

Q. And how far did you get across, James; before anything happened? A. I would say about the middle of the street.

Q. Then what happened, if you remember, James? A. I was hit, that is all.

Q. What is the next thing you remember? A. Being in the hospital.

30 Q. Now, was this on the crosswalk of Dover Street and Twentieth Avenue? A. Yes.

Q. Now, will you explain to the Court, Judge Wolber, and these men and women how far you were in front of the left front headlight when you made this observation up and down? A. About—

Q. From you to where I am? Tell me to come forward or go back. A. Come forward.

Q. All right. A. About from me to you.

40 Q. About from where you are to where I am? A. Yes.

*James Rizio, Jr., for Plaintiff—Direct.*

By the Court:

Q. Four feet? A. Yes, about that.

The Court: He said so. He gave it. He says four feet.

By Mr. Duffy:

10

Q. Now, when you awakened in the hospital do you remember how you felt, James? A. Yes.

Q. Well, will you tell that to these men and women and to the Judge? A. I felt more pain and I felt like picking the blood out of my ears.

Q. Where did you feel the pain? A. In my head and in my left leg.

Q. Now, describe that pain, James. Was it severe? A. Yes, it was a bad pain.

20

Q. A bad pain. Now, how long, if you remember, James, were you in the hospital? A. Twenty-two days. About three weeks.

Q. About three weeks. After you were discharged from the hospital where did you go? A. I went home and I stayed home for about—till a week before vacation; then I went back to school.

Q. While you were home were you confined to your bed or partly to bed and partly up? A. Partly to bed and partly up.

30

Q. And during that time did the doctor come to see you? A. I went and saw the doctor.

Q. Do you remember the doctor's name, Jimmy? A. Dr. Clay.

Q. Dr. Clay. Do you remember how often you went to see Dr. Clay? A. Every week. Every Friday.

Q. And do you remember what Dr. Clay did or what he was treating you for during those visits? A. Yes, he was treating me for double vision.

40

*James Rizio, Jr., for Plaintiff—Direct.*

Q. For what? A. I seen double.

Q. For double vision? A. Yes. I seen double.

Mr. Fryling: If the Court please, I think the doctor should testify to this.

The Court: Well, couldn't he tell?

10

Mr. Fryling: If he knows of his own knowledge.

The Court: Yes, if he knows of his own knowledge. You and I would know it, wouldn't we? I don't know about a child, I mean, but you know whether you see double or not.

Mr. Fryling: If he knows that is what he was being treated for by that doctor.

20

Mr. Duffy: That is what he said, Judge Wolber.

The Court: That is what he said, double vision. You will have a chance to find out about it on cross examination.

Mr. Fryling: All right, I will withdraw the objection.

30

Q. Now, Jimmy, while you were in the hospital what was the condition of your eyes or eye? A. If I closed one eye I could see, I could see one, but if I opened the two eyes I could see two persons.

Q. When you were looking at one? A. When I was looking with one I could see one person, and if I opened the two eyes I could see two persons.

Q. Was there anything funny or unnatural about that eye? A. Yes.

Q. Or eyes? A. Yes.

40

Q. What was that, Jim? A. My left eye was in the middle, right here (indicating).

*James Rizio, Jr., for Plaintiff—Direct.*

By the Court:

Q. It was what? A. It was near my nose.

Mr. Duffy: Pointing to somewhere near the left side of his nose, the upper part of his nose.

10

Q. Which eye was that? A. My left eye.

By Mr. Duffy:

Q. Now, when you started on the crosswalk and went across Twentieth Avenue at Dover Street, were you walking or running or trotting or what, Jimmy? A. Half trot.

Q. Now, who was with you, either in front or in back or at your side, Jimmy? A. Michael Maloney, in back of me.

20

Q. Michael Maloney was in back of you. Well, was there any pain during the time you were in the hospital, as far as your eyes were concerned, Jimmy? A. Yes.

Q. Well, could you describe that? A. It burned.

Q. It burned? A. Yes.

Q. Now, what sort of a pain was there in either one or both of your legs, Jimmy? A. It felt like it was asleep.

By the Court:

30

Q. What was that? A. It felt like it was asleep.

Q. Well, which leg? A. The left one.

Q. The left leg felt as though it was asleep?  
A. Yes.

By Mr. Duffy:

Q. Did you see any bruises on it, Jimmy? A. No.

Q. Now, how do your eyes feel today? A. Well, if I read for fifteen minutes, they burn.

40

*James Rizio, Jr., for Plaintiff—Cross.*

By the Court:

Q. They do what? A. They burn.

Q. If you read for how long? A. Fifteen minutes.

Q. Which eye? A. This one.

10 Q. With the left eye? A. Yes.

Q. Only one burns? A. Well, yes.

By Mr. Duffy:

Q. Jimmy, when you are in school does anything unusual happen to your eyes when you read?  
A. Yes.

20 Q. What is it? Tell these people. A. If I read for about fifteen minutes, then they start to burn and burn. When I close them it burns more, this here one (indicating).

Q. Now, since the time of this accident, Jimmy, have you suffered from headaches? A. Yes.

Q. How frequently? A. When I go to—when I go to the movies, then if I just shake my head then I feel the pain.

Q. Jim, since this accident are you any more nervous than you were before? A. Yes.

Q. Now, when you were in the hospital were there any bandages on your head? A. Yes.

30 Q. Do you remember where? A. About here, in back of the left ear.

Q. Jim, before this accident did you have headaches? A. None that I remember.

Q. And were you at all nervous or did you have any nervous condition before this accident? A. No.

Mr. Duffy: Cross examine.

*Cross examination by Mr. Fryling:*

40 Q. This accident happened on a Monday, didn't it, James? A. Yes.

*James Rizio, Jr., for Plaintiff—Cross.*

Q. And that was the first day of your Easter vacation? A. Yes.

Q. You say you were ten years of age at that time? A. Yes.

Q. You were going to be eleven that next June? A. Yes.

Q. You were in the sixth grade? A. Yes. 10

Q. And you say that you lived on Martin Street? A. Yes.

Q. That was just around the corner from where this accident happened, wasn't it? A. Yes.

Q. How long had you lived there? A. I don't think I remember.

Q. Quite a while? You hadn't just moved there, had you? A. I don't know.

Q. And every day after school you would go out and play around that neighborhood? A. Yes. 20

Q. On Twentieth Avenue? A. Not on Twentieth Avenue.

Q. How about the sand lots between Lewis Street and Dover Street? A. No.

Q. You never played there? A. No.

Q. That is just about a block from your home? A. Yes.

Q. How long had you been out on Twentieth Avenue this afternoon? A. We had just gone there. 30

Q. You had been playing on the sidewalk, hadn't you? A. No; we were playing on Martin Street.

Q. On Martin Street? A. Yes.

Q. Would that be on the south side of Twentieth Avenue? Do you know what I mean by the south side? A. No.

Q. Do you know what side of Twentieth Avenue you were on before you started to cross the street? A. I was on the right side of it. 40

*James Rizio, Jr., for Plaintiff—Cross.*

Q. That was the south side, wasn't it, or don't you know what I mean by south? A. Yes.

Q. Well, now, when you had been playing on Martin Street were you on the same side of Twentieth Avenue? A. I wasn't on Twentieth Avenue.

10 Q. No, you were on Martin Street. A. Yes.

Q. The same side of Twentieth Avenue before you came around the corner? A. If you walk on the sidewalk, you mean?

Q. Yes. A. Yes.

Q. So that you came around the corner from Martin Street and walked down to Twentieth Avenue? A. No, you could—me and Michael, we went through the yard.

Q. You went through the yards? A. Yes.

20 Q. And then you came out from between the houses and went on across Twentieth Avenue? A. Started to cross Twentieth Avenue.

Q. You were going where? A. To get Billy Winterberg.

By the Court:

Q. To get what? A. To get the boy over there, Billy Winterberg.

Q. Billy what? A. Winterberg.

30 Q. Billy Winterberg? A. Yes.

By Mr. Fryling:

Q. Where was he standing? A. He was standing on Martin Street and Twentieth Avenue, on the opposite side.

Q. That is, back at the corner? A. Yes.

Q. And as you came from the sidewalk you walked towards him? A. We were going to go across and then up.

40 Q. I see. Now, what buildings did you come between? A. We were at the crossroad near the bungalow there.

*James Rizio, Jr., for Plaintiff—Cross.*

Q. Now, you said you cut through the yards, didn't you? A. Oh, yes.

Q. Where did you come out to Twentieth Avenue? A. Near the apartment houses.

Q. Which one? A. There is a big one, six—

By the Court:

10

Q. What was that? A. A six-family house.

Q. The six-family one? You mean that is the big apartment house? A. Yes.

By Mr. Fryling:

Q. Well, you came out, then, between the six-family house, the apartment house, as you call it, and the barber shop or the garages next door?

A. No, we came out from the six-family house and another two-family house.

20

Q. Between those two? A. Yes.

Q. Between the six-family house and the two-family house? A. Yes.

Q. And you went right out to the sidewalk? A. We went right to the sidewalk.

Q. And then you were going to cross the street right there? A. No. We went down.

Q. In what direction? A. We went towards Madison Avenue.

30

Q. That would be towards your right, towards Lewis Street? A. Yes.

Q. How far up that street did you go, up Twentieth Avenue? A. We went up to a bungalow.

Q. And what did you do there? A. Then we started to cross in front of the parked car.

Q. How did you get up Twentieth Avenue? Did you walk? A. I don't know what you mean.

Q. Well, when you came out between the two buildings and you say that you walked up Twen-

40

*James Rizio, Jr., for Plaintiff—Cross.*

tieth Avenue, did you walk up there? A. No, we went down to the bungalow.

Q. Yes, towards Lewis Street. A. Yes.

Q. And did you walk down to where you started to cross the street? A. Yes.

Q. And then you went to the curb or the gutter?  
10 A. Yes.

Q. And stepped out on your way across the street? A. Yes.

Q. You walked all that time? A. No, we didn't walk all that time.

Q. Well, what were you doing? A. We ran down to the bungalow, then we were walking.

Q. All right. Now, when you came out from between the six-family house and the two-family house did you see Billy across the street then?  
20 A. Yes.

Q. He was on that same corner, that is, Martin Street and Twentieth Avenue? A. Yes.

Q. But you turned and walked away from where he was, or ran away from where he was? A. Yes.

Q. When did you decide to go back to him? A. Well, we were going to hide behind the car, then cross the street, and then go up and get him.

Q. You were going to hide behind the automobile that was parked there and then you were going to chase Billy on the other side of the street; is that it? A. Yes.  
30

Q. In other words, you were sort of playing a game? A. Yes.

Q. You didn't want him to see you coming? A. No.

Q. So you hid behind the automobile and then ran across the street and were going to chase him? A. Half trot. We didn't run across.

Q. Oh, you didn't run then? A. No.

40 Q. Are you sure of that? A. Half trot, yes.

*James Rizio, Jr., for Plaintiff—Cross.*

Q. Now, James, weren't you running when you were hit by this automobile? A. No.

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

Q. When did you stop running? A. We were not running; we were walking.

Q. You said you ran down Twentieth Avenue towards Lewis Street to the parked car? A. Yes. 10

Q. When did you stop running? A. Well, right at the parked car.

Q. I see. And then you just half ran out in front of the parked automobile? A. Yes.

Q. And continued on, half running or half trotting? A. Yes.

Q. Across Twentieth Avenue. You didn't stop at all from the time you came out between the two buildings? A. Oh, yes, we stopped to look for cars. 20

Q. That is the car that was coming from Lewis Street? A. Yes.

Q. And was going back towards Billy Winterberg? A. Yes.

Q. You had to stop and wait for that car? A. No. First I looked to my left and then I looked to my right, and we seen an old truck coming, so then we said, "Let's wait for the truck." We waited about five seconds, then started to cross. There was nothing to my left. 30

Q. You were standing in front—

The Court: Wait a minute. Let him finish. What was that?

A. There was nothing to my left.

Q. That is when you looked before you saw this truck coming the other way? A. Yes.

Q. And the truck went by and you half trotted across the street? A. Yes.

Q. You didn't look again, did you? A. No. 40

*James Rizio, Jr., for Plaintiff—Cross.*

Q. Well, now, when you looked to your left and didn't see anything and then looked to your right and saw the truck, was that down the other side of Lewis Street? A. No.

Q. Where was it? A. It was about in the middle of Dover Street.

10 Q. Between Dover Street and Lewis Street, or do you mean halfway across Dover Street? A. It was about halfway across Dover Street.

Q. Now, that was how far from where you stood behind the parked car? A. It was right in the middle of Dover Street and about—

Q. Well, how far was that from you? How many feet? A. Ten feet, about.

Q. Ten feet down the street from where you were? A. Yes.

20 Q. And the truck was going slowly? A. Huh?

Q. The truck was going slowly? A. No, it wasn't going slow.

Q. Going pretty fast? A. Yes.

Q. And you were still behind the parked automobile or in front of it as that went by? A. Yes.

Q. And as soon as that went by you started half trotting across the street? A. Yes.

30 Q. After Billy Winterberg. Without looking again to see if any cars were coming down the street? A. Yes.

Q. So that you never saw this automobile that hit you, did you? A. No.

Q. You don't know where it came from? A. No.

Q. Or how fast it was going? A. Must have been going pretty fast.

Q. It hit you hard? A. Yes.

Q. That is the only reason you say that, isn't it? A. No, because there was no car in sight to my left.

40 Q. Well, that is when you looked before you stepped away from this truck, isn't it? A. I

*James Rizio, Jr., for Plaintiff—Cross.*

looked left first and it was clear, no car at all. Then I looked to my right and I seen an old truck about ten feet away.

Q. And you waited for the truck?

Mr. Duffy: Let him finish.

Q. And you didn't look again, did you? 10

Mr. Duffy: Now, wait a minute. Let him finish.

A. The truck went past. In about five seconds it passed me. Then I started to cross.

The Court: Then you started to cross?

Q. Without looking again? A. Yes.

Q. What part of his car hit you, do you know? 20

A. I am sure the front of the car.

Q. What part of the front? The left side or the right side?

The Court: Do you know, Jimmy?

A. The left side.

Q. The left side? A. Yes.

Q. You are sure about that? A. Yes.

Q. How do you know? A. Because we were almost in the middle of the street when we got— 30  
when I was hit.

Q. How do you know the car wasn't almost in the middle of the street, too? You don't know that, do you? A. We were in the middle of the street; then the car should have been on the right, on our right.

Q. You don't know that the car was on the right, do you? A. No, but it is supposed to be on the right.

Q. Now, who told you that you were hit by the left side? A. Nobody told me. 40

*James Rizio, Jr., for Plaintiff—Cross.*

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

Q. You say that you were with Maloney? A. Yes.

Q. What is his first name? A. Michael.

By the Court:

10 Q. What do you call him? Mike? A. Yes.

By Mr. Fryling:

Q. And he was out in the middle of the street, too, when you were hit? A. No.

Q. He wasn't? A. No.

Q. Where was he? A. He was near the parked car.

Q. He was back near the parked car? A. Yes.

20 Q. Was he waiting for this automobile that was coming up the street? A. I don't know.

Q. You don't know about that. Well, he wasn't running or half trotting across Twentieth Avenue with you, was he? A. No.

Q. Dr. Clay came to see you in the hospital? A. Yes.

Q. And you told him how this accident happened? A. Nope.

30 Q. You didn't tell him anything about how it happened? A. No.

Q. Are you sure about that? A. Yes.

Q. Don't you remember telling him that you were standing in the gutter and something hit you and you don't know what it was? A. I don't remember.

Q. You don't remember telling him that?

Mr. Duffy: May I ask counsel through the Court to indicate who he is alleged to have been speaking to?

40 Mr. Fryling: Dr. Clay.

*James Rizio, Jr., for Plaintiff—Cross.*

Mr. Duffy: Oh, Dr. Clay? I am sorry, Counsel.

The Court: He doesn't remember telling him.

Q. You don't remember telling Dr. Clay that you were hit while you were standing in the gutter? A. No. I remember telling him I was hit, but I don't remember telling how it happened. 10

Q. Don't you remember telling him, also, that you weren't sure what it was that hit you, whether or not it was an automobile? A. I don't remember.

Q. What did you tell him about how it happened? A. I don't remember telling him anything about how it happened.

Q. Did you tell him you were hit by something? A. Yes. 20

Q. What did you say you were hit by? A. A car.

Q. Did you tell him where you were when you were hit? A. Yes, on Twentieth Avenue.

Q. Did you tell him what part of Twentieth Avenue? A. I don't remember.

Q. You don't remember whether you told him it was in the middle of the street or not?

The Court: Did you answer that, Jimmy? 30  
The Witness: What?

(The last question was read by the reporter.)

A. No, I don't remember.

The Court: He doesn't remember.

Q. When did you go back to school, James? A. About a week from vacation. 40

*James Rizio, Jr., for Plaintiff—Cross.*

Q. Do you remember what date it was? How soon after the accident? A. No.

Q. Do you know what month it was in? A. June.

Q. Did you go back in May? A. No.

Q. Are you sure about that? A. Yes.

10 Q. As a matter of fact, you went back on the 24th of May, didn't you? A. No.

Q. When did your vacation start? A. The 28th of June.

Q. So can you tell us approximately when you went back to school, according to your memory now? A. The 23rd, I guess.

Q. The 23rd? A. No, the 21st, June the 21st.

Q. Of what month? A. June.

20 Q. Don't you remember telling your lawyer that you went back in May, on May 24th? Did Mr. Duffy ever ask you? A. He asked me when I went back and I said I went back a week from vacation.

Q. Now, you say that your eyes burn when you read? A. Yes.

Q. Every time you read for fifteen minutes, or just once in a while? A. No, every time.

Q. Every time? A. Yes.

30 Q. Don't very often read for longer periods of time than that, then; is that correct? A. I don't know what you mean.

Q. You can't read for more than fifteen minutes without stopping? A. No.

Q. Do moving pictures bother your eyes? A. Yes.

Q. So that you don't go to the moving pictures? A. Yes, I go.

Q. You go. Do you frequently go and sit in the movies for three hours or so? A. Yes.

40

*James Rizio, Jr., for Plaintiff—Re-direct.*

*James Rizio, Sr., for Plaintiff—Direct.*

Q. That doesn't trouble you, does it? A. It troubles me, but I want to see the picture.

Q. Even though it hurts your eyes, you go anyway? A. Sure.

Q. You can play games all right, can't you? A. Yes. 10

Q. Baseball and football? A. Yes.

Q. You can see all right for that? A. Yes.

Q. As a matter of fact, your eyes are all right now, aren't they? A. Now, yes.

Mr. Fryling: That is all.

*Redirect examination by Mr. Duffy:*

Q. Just a minute, Jimmy. I notice that your eyes blink or twitch. Did they do that before the accident? A. I don't know. 20

Mr. Duffy: That is all.

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JAMES RIZIO, SR., SWORN.

*Direct examination by Mr. Duffy:*

Q. Mr. Rizio, where do you live, please? A. 89 Martin. 30

Q. 89 what? A. Martin Street.

Q. Where is that located? A. It is located on—

Q. No, no. In what city? A. In Paterson, of course.

Q. And where are you employed? A. In Wright's.

Q. You are the father of the James Rizio that was just testifying? A. That is right, yes, sir.

Q. And you are one of the plaintiffs in this case; is that correct? A. That is right. 40

*James Rizio, Sr., for Plaintiff—Direct.*

Q. After your boy was in the hospital did you receive this bill in the amount of \$82? A. Yes, sir.

Q. And have you paid it so far, Mr. Rizio? A. Nope.

10

Mr. Fryling: I object to that. It is immaterial, if your Honor please. It is not proof of the hospital bill, whether or not he received it and paid the bill.

The Court: I thought probably you had agreed on the amount.

Mr. Fryling: There is no such agreement.

The Court: Then, of course, you have to prove it by somebody else, Mr. Duffy, or connect it up, anyway.

20

Q. You did receive a bill from the hospital? A. That is right.

Q. How much was that bill?

Mr. Fryling: I object, if your Honor please.

The Court: Just a moment. I am afraid you can't connect it up by him, Mr. Duffy.

Mr. Duffy: All right.

30

Q. Any bill you received from the hospital, Mr. Rizio, have you paid it?

Mr. Fryling: I object on the ground it is immaterial.

A. I didn't pay.

The Court: Wait a minute, Mr. Rizio. I have to rule on that. Is that objection pressed?

40

*James Rizio, Sr., for Plaintiff—Direct.*

Mr. Fryling: I can't see that it is material.

The Court: But you are probably going to prove the hospital bill in the case, aren't you, Mr. Duffy?

Mr. Fryling: I think that should be done.

The Court: You have to do it by getting the person from the hospital up here. 10

Mr. Duffy: We are going to do that.

The Court: You are probably going to get that amount into evidence.

Mr. Fryling: If it is going to be proved, I will withdraw my objection.

The Court: All right.

Mr. Duffy: I don't want to do anything, Counsel, that you don't want to do. Can we agree upon the amount? 20

Mr. Fryling: I will insist on your proving it.

Mr. Duffy: Very well, if you insist upon formal proof.

Q. Did you receive a bill, Mr. Rizio, from Dr. Clay? A. Yes.

Q. Did you also receive a bill from Dr. Sanfacon? A. Yes, sir.

Q. Did you receive a bill from any other doctors? A. No. 30

Q. Did you receive a bill for any X-rays that were taken? A. Yes, everything from the hospital is in your office. I bring her down all the time.

(The answer was read by the reporter.)

The Court: He means he brought it to the lawyer.

Mr. Duffy: That is good practice. 40

*James Rizio, Sr., for Plaintiff—Direct.*

The Court: Oh, yes, no doubt about that.  
It is the customary practice.

Q. Do you remember this date of April 10, 1939, Mr. Rizio? A. Yes.

10 Q. When was the fact that your boy was injured first brought to your attention? A. As soon as I come out from the shop. Half past four we stop, and as soon as I reached Martin Street in the front of the house there was a lot of people, and I says, "What is the matter? Something happened?"

Q. All right. You had some conversation, and after that what, if anything, did you do? A. After that I went—I run up to the hospital.

20 Q. And did you see your boy? A. I seen my boy. He was, you know, no conscience yet. I started to ask him questions and he answered me, you know—he don't answer me full, the way he used to before.

Q. Where was he when you saw him in the hospital? What part of the hospital? A. He was in the General Hospital. He was in bed.

Q. In bed? A. Yes.

30 Q. And from his actions or behavior could you tell whether or not he was in pain? A. Well, he was all bandaged when I reached up there.

Q. Was he complaining or moaning? A. Oh, he was hollering, yes.

The Court: He was what?

Q. He was what? A. He was crying, like.

Q. Now, did you go to the scene of the accident, Mr. Rizio? A. Well, as soon as I passed there I seen some fellow was—was a WPA shanty there, and they told me—

40

*James Rizio, Sr., for Plaintiff—Direct.*

Mr. Fryling: I object.

The Court: Wait a minute. You can't tell us that.

Q. No. Did you go to the scene of the accident, Mr. Rizio? A. No, I didn't see the accident.

10

Q. Did you go to the road, the corner of Dover Street and Twentieth Avenue? A. That is right, yes.

Q. Did you go to the place where the boy was struck by the car? A. Yes.

Q. Did you see any skidmarks in the road?

Mr. Fryling: I object, if your Honor please.

A. Yes.

20

The Court: Wait a minute, now. I think you will have to, first of all, show when the accident happened, then you will have to show when he got there.

Q. About what time did you get to the scene of the accident, Mr. Rizio? A. About five minutes after.

Q. Five minutes after what? A. After the accident.

30

Q. Did you go to the scene of the accident before you went to the hospital? A. I passed there, but I didn't notice right away. But when I came back I seen somebody and they told me that—

The Court: Wait a minute.

Mr. Fryling: I object to anything said to him.

The Court: Anything said to him cannot come out. First of all, this witness said he passed that point five minutes after

40

*James Rizio, Sr., for Plaintiff—Direct.*

the accident. I don't know how he knows that. Somebody must have told him, if he wasn't there.

Mr. Fryling: I was going to ask to have it stricken.

10 The Court: It is based on hearsay, Mr. Duffy.

Mr. Duffy: I understand that, and I certainly accede to Counsel's suggestion that it be stricken and disregarded.

The Court: All right, it will be stricken.

Q. Having talked to the crowd of people in front of your house, did you go to where the boy was hurt?

20 Mr. Fryling: I object, if the Court please, because he couldn't possibly know where the boy was hurt unless it is based upon hearsay.

The Court: It is practically the same thing, Mr. Duffy, isn't it? This witness said that he arrived at the house and there was a crowd of people; he went to the hospital and then he didn't notice—he said he passed the place.

30 Mr. Duffy: All right.

Q. Mr. Rizio, what do you mean when you say you passed the place? A. You got to go through the street to go up to the hospital.

Q. What place are you talking about? A. I mean Dover Street.

Q. All right. What particular part of Dover Street? A. On that side of Twentieth Avenue near East 18th Street, 19th Street.

40 Q. Did you stop? Did you stop at Twentieth

*James Rizio, Sr., for Plaintiff—Direct.*

Avenue and Dover Street on the way to the hospital? A. There was a lot of people there yet.

Q. Did you stop and get out? A. Get out of what?

Q. Were you in an automobile or were you walking? A. I walk.

Q. When you came to Twentieth Avenue and Dover Street did you stop or did you go right to the hospital? A. I went right to the hospital. 10

Q. Now, when you came back from the hospital did you go to Twentieth Avenue and Dover Street? A. Yes. There was a few people, and one fellow was a WPA watchman there, he told me that this was the place.

Mr. Fryling: I object, if the Court please. 20

A. This was the place.

The Court: Wait a minute. You can't tell what he told you. You mustn't tell us that.

A. All right, I won't say.

The Court: We will keep you straight, but you mustn't tell that yet. 30

Q. Mr. Rizio, did you visit the boy in the hospital after the day of the accident? A. I didn't go to work the next day.

Q. Now, how often after that did you go to see the boy in the hospital? A. Yes, pretty near every day.

Q. Pretty nearly every day. What was his condition as the days went on? A. The day after I went up there this eye was right inside (indicating). 40

*James Rizio, Sr., for Plaintiff—Direct.*

By the Court:

Q. Which eye? A. The left eye.

Q. The one you are pointing to now, the left?

A. Yes. The ball of the eye was right inside here. He was like cock-eyed.

10 By Mr. Duffy:

Q. Cock-eyed? A. Well, yes. You know, his eye wasn't straight any more.

Q. Was his eye that way before the accident?

A. Nope.

Q. Were his eyes normal and straight? A. Right.

20 Q. Now, what else about his condition the next day when you went there? A. Well, I met a fellow by the name of Laffrican up there, and he told me—

Mr. Fryling: I object to what he was told.

The Court: Don't answer.

Q. No, never mind any conversation about Laffrican.

30 The Court: You can't tell what Laffrican told you.

A. Yes. He came up there and he wanted—

Q. No, no, Mr. Rizio.

The Court: You mustn't tell what he said.

A. Oh, all right.

40 The Court: That is all right. We will keep it straight. If your lawyer don't, the other lawyer will.

*James Rizio, Sr., for Plaintiff—Direct.*

Mr. Duffy: Or the Judge will.

The Court: Or call on me and maybe I will.

Q. Mr. Rizio, was the boy nervous before the accident? A. No.

Q. Was he nervous after the accident? A. Oh, now. 10

Q. Well, do you observe any nervousness nowadays? A. Sure.

Q. Does the boy evidence anything unusual about his eyes now? A. When he starts to read, then he stops, you know; he can't read steady.

Q. Does he complain of anything? A. Oh, yes.

Q. What does he say is the matter? A. After—

Mr. Fryling: I object. 20

The Court: Wait a minute. Self serving. I am afraid you can't get that in. You got in there that he observed that he stopped reading after he had gone fifteen minutes.

Q. Does the boy complain about headaches, Mr. Rizio?

Mr. Fryling: I object to the question as hearsay. 30

The Court: I will sustain the objection.

Q. Now, in addition to the hospital bill, Mr. Rizio, and the doctor's bill, did you get any other bills? A. I pay for some. I pay \$5 the other night.

Q. For what? A. For Dr. Sanfacon.

Mr. Fryling: I object, if your Honor please, and ask to have it stricken as not proper proof.

The Court: That could be connected up, of course. 40

*James Rizio, Sr., for Plaintiff—Cross.*

Mr. Duffy: He will be here.

The Court: He paid \$5 to a doctor, he says.

A. Otherwise he insists he——

10

The Court: Wait a minute. You are not supposed to talk now. Wait until the lawyers ask you something again.

Q. Was it necessary for you, Mr. Rizio, to pay any moneys out for medicines or bandages or anything like that? A. No.

Mr. Fryling: What was the answer?

Mr. Duffy: The answer was, "No." You may cross examine.

20

*Cross examination by Mr. Fryling:*

Q. How long had your family and you lived at that address on Martin Street? A. About five years.

Q. Five years. Twentieth Avenue is a pretty well traveled street, is it?

Mr. Duffy: Oh, I object to that.

30

The Court: What are you going to do now? Show the general condition at some other time, the condition of traffic or things like that?

Mr. Fryling: The boy's familiarity with the danger, your Honor.

Mr. Duffy: Where does he fit in with a ten-year-old boy's knowledge of dangerous conditions?

40

Mr. Fryling: By his training, what he instructed him as to crossing streets. It is important.

*James Rizio, Sr., for Plaintiff—Cross.*

The Court: How would that have any bearing on it?

Mr. Fryling: On the question of the boy's contributory negligence.

The Court: That boy is in no different position in the law, as I understand it, in New Jersey from anybody else, except in respect to boys of that age. Any negligence on the part of the parents certainly isn't imputable to the child. 10

Mr. Fryling: I don't mean the negligence of the parents.

The Court: How is it material, then, what the parents told him?

Mr. Fryling: Showing what training the boy had had, with respect to traffic conditions generally. 20

The Court: Is there any objection to it, Mr. Duffy? Do you object? Are you objecting, Mr. Duffy?

Mr. Duffy: If he wants to prove his training, no. If he wants to prove that his father told him to do this and not to do that, I am willing.

The Court: Go ahead. There is no objection. He is not objecting to it.

(The last question was read by the reporter.) 30

Mr. Duffy: Just a moment. I object to that.

Mr. Fryling: All right, I will reframe it.

Q. Mr. Rizio, as your boy was growing, and before the time of this accident, you had instructed him, had you not, as to the danger of being hit by automobiles? A. Like any other father, I tell the 40

*Michael Maloney, for Plaintiff—Direct.*

kids what to do, sure, watch out, watch out crossing the street.

Q. "Be careful when you cross the street"?

A. "Never run on the street," I told him, sure.

Q. That is it. You had done that? A. Sure.

10 Q. And, if you know, he had been told that sort of thing in school? A. I think so.

Mr. Duffy: Well, now, that is—

The Court: He wouldn't know that. We can almost take judicial notice of that as a matter of general information with respect to the bringing up of children these days, under these modern conditions, where we have swift-moving vehicles on the highways. I think we can all admit that. Isn't that so?

20 Mr. Duffy: Surely. He might have been one of those junior patrolmen, too.

Mr. Fryling: That is all.

The Court: Is that all you wanted?

Mr. Fryling: That is all.

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MICHAEL MALONEY, called.

30 By the Court:

Q. How old are you? A. Fourteen.

Q. Do you know why you are in court? A. Yes, to testify.

Q. Do you know what it means to testify? A. Yes, to tell the truth about what happened.

Q. To tell the truth about what? A. To tell the truth what you seen.

Q. What you saw. Where do you go to school?

40 A. 15's.

*Michael Maloney, for Plaintiff—Direct.*

- Q. Which grade are you in now? A. 8-B.  
 Q. You are fourteen years old? A. Yes.  
 Q. Do you know what it means to put your hand on the Holy Scriptures, the Bible? A. God will listen.  
 Q. And to be asked to tell the truth and nothing but the truth? A. Sure. 10  
 Q. Do you know what that means? Do you know what it means to call on God while you are talking? A. Yes, He would listen to it.  
 Q. Who will listen to you? A. God.  
 Q. And do you know what would happen to you if you didn't tell the truth? A. You wouldn't go to Heaven.  
 Q. You understand that? A. Yes.

The Court: He may be sworn.  
 (The witness was thereupon duly sworn.) 20

*Direct examination by Mr. Duffy:*

- Q. Michael, where do you live? I. I live on 254 Twentieth Avenue.  
 Q. In what city? A. Paterson, New Jersey.  
 Q. How old are you now, Michael? A. Fourteen.  
 Q. You are a boy friend of Jimmy Rizio's? A. Yes. 30  
 Q. And one of his playmates? A. Yes.  
 Q. Do you remember about two years ago, on April 10, 1939, being with him at Twentieth Avenue and Dover Street? A. Yes.  
 Q. And did anything unusual happen then? A. Well, we were behind a parked car—

By the Court:

- Q. Who do you mean by "we"? A. Jimmy and I were behind the parked car. We were go- 40

*Michael Maloney, for Plaintiff—Direct.*

ing after Billy Winterberg, who was at the corner of Martin Street and Twentieth Avenue, and we were behind the parked car. We looked up and down first. We seen an old truck coming up.

10 Q. You just tell what you saw. A. I seen an old truck coming up, and I said, "We will wait till the truck goes past and then we will cross."

Q. Who said that? You? A. Yes.

Q. Whom did you say it to? A. Jimmy.

Q. Go ahead.

By Mr. Duffy:

Q. Mike, did you wait till the truck passed?

A. Yes, we did.

20 Q. Will you explain to me, Mike, by telling me to come forward or stop how far you were in front of the parked car? A. Right there.

Q. Right here? A. Yes.

Q. You and Jimmy were this distance in front of the parked car? A. Yes.

The Court: How many feet would you estimate?

Mr. Duffy: Four or five.

Mr. Fryling: It is the same distance as indicated by the infant plaintiff.

30 The Court: This seems to be longer to me, but not much. I think nearer six feet.

Mr. Duffy: Well, if I fall forward on my face we will know how much it is. It would be about six feet.

Q. Now, after you both stopped——

By the Court:

40 Q. Pardon me just a moment. I want to get that. Were you in front of that parked car? A. Yes.

*Michael Maloney, for Plaintiff—Direct.*

Q. Now in back of it? A. The front was facing towards Madison Avenue, and we were in front of it.

Q. Which way is Madison Avenue? Is that east?

Mr. Duffy: Madison Avenue is east.

10

The Court: Just a moment. Let's see if the boy knows.

Q. Is Madison Avenue east? A. Yes, down that way.

Q. And where was the parked car? A. The parked car was on this side.

Q. Where were you boys? A. In front of the left headlight.

Q. You were about six feet away from it? A. Yes. 20

By Mr. Duffy:

Q. Mike, were you on the crosswalk of Twentieth Avenue and Dover Street? A. Yes.

Q. And the parked car was facing the river or Eastside Park, about six feet back from it? A. Yes.

Q. All right. Now, after you stopped to let the truck go by going toward downtown, then what did Jimmy do? A. He started to half trot across the street. 30

Q. And what happened? A. Well, I seen—about eight feet I could say there was a car all of a sudden.

Q. And what happened after you saw that all of a sudden? A. I don't know. I was scared.

Q. I beg your pardon? A. I didn't do nothing. I was standing there. I couldn't do nothing. 40

*Michael Maloney, for Plaintiff—Cross.*

Q. Could you tell whether the car was going fast or slow or at a moderate rate of speed? A. It was going quite fast.

Q. Going quite fast. Did you hear the driver of the car apply brakes or did you hear any— A. I didn't hear no brakes or nothing.

10 Q. Did you hear a horn, Mike? A. No.

Q. Was there any horn blown? A. No.

Q. Now, do you know, Michael, how far Jimmy was thrown? A. He was thrown around from twenty-five to thirty feet, and then he rolled quite some.

Q. Now, how quickly, if you know, did the car stop, or how long did it take the car to stop? A. Well, the back, the rear end of the car, was even with the front end of the parked car.

20 Q. Before it stopped? A. Yes.

Q. Did the driver of that car get out of the car? A. No.

Q. Who picked Jimmy up, if you know? A. A man, a passer-by, who was on the corner. He ran and picked Jimmy up and put him into a passing car.

Q. And the driver of the car that struck him didn't get out at all? A. He got out after a while, after a while.

30 Q. After Jimmy had left? A. Yes.

Mr. Duffy: Cross examine.

*Cross examination by Mr. Fryling:*

Q. You live at 254 Twentieth Avenue? A. Yes.

Q. You have lived there for how long a time? A. Two years I have been living there.

40 Q. Two years before this accident? A. Yes, I have been living there two years, because I am—

*Michael Maloney, for Plaintiff—Cross.*

Q. Where had you and Jimmy been before you started to cross the street? A. First we were on Martin Street and then we cut through the yards and we came out and then we started to walk—run down to the parked car. Then we walked behind the—in front of it. We looked up and down.

10

Q. Well, now, you were playing for a while on the sidewalk on Twentieth Avenue, weren't you? A. No. We were running down, that is all.

Q. You just came out between the two houses— A. Yes.

Q. (Continuing)—and down Twentieth Avenue— A. Toward the parked car.

Q. (Continuing)—toward Lewis Street or toward the parked cars, and then stopped in front of the first parked car? A. Yes.

20

Q. And you were going to chase Billy Winterberg? A. Yes.

Q. You were hiding behind the parked car from him? A. Yes. In front of it.

Q. Where was he? A. Who? Billy?

Q. Billy Winterberg. A. He was on the corner of Martin Street and Twentieth Avenue, the opposite side of us.

Q. So that would be back towards where you had originally been, Martin Street and Twentieth Avenue?

30

The Court: Is Martin Street west of Dover?

Mr. Fryling: West.

Mr. Duffy: Martin Street would be west of Dover Street.

The Court: Away from the river? Away from the river?

Mr. Duffy: It would be a block toward downtown.

40

*Michael Maloney, for Plaintiff—Cross.*

The Court: Away from the river?

Mr. Duffy: I beg your pardon?

The Court: Away from the river?

Mr. Duffy: Away from the river, yes, and on the other side, toward Market Street.

10

Q. Now, how many parked cars were there there? A. Three.

Q. Three? Are you sure about that? A. Yes.

Q. And they were all facing east? A. They were all facing towards Madison Avenue.

Q. That is, towards the river, towards Lewis Street? A. Yes.

Q. Now, this place where you two were hiding was the last parked car on the road, wasn't it?  
20 A. The first one.

Q. There were two parked cars in back of that one? A. Yes.

Q. This was the first one from Lewis Street?  
A. Yes.

Q. But it was the last one that you came to?  
A. Yes.

Q. In other words, you had passed two parked automobiles and went up to the third one and got up in front of that and crouched down so  
30 that Billy couldn't see you? A. Yes.

Mr. Duffy: He didn't say that, if the Court please.

Mr. Fryling: He just said it now.

The Court: Well, wait a minute. You can't say it unless he did say it.

Mr. Duffy: I have no objection to counsel asking that, but not to put it in his mouth as if the direct examination brought it out.

40

*Michael Maloney, for Plaintiff—Cross.*

Q. Were you crouched down in front of this car, hiding from Billy? A. We weren't crouching down; we were standing up.

Q. Standing up perfectly straight? A. Not straight.

Q. Bent over a little bit? A. Yes, just a little bit. 10

Q. So you were crouched a little bit, so that Billy couldn't see you through that car? A. Yes.

By the Court:

Q. He was on the other side of the street, wasn't he? A. Yes, Billy was.

Q. Billy was on the other side of the street? A. Yes, on the corner.

Q. At the corner of Martin Street? A. Martin and Twentieth. 20

Q. Martin and Twentieth.

By Mr. Fryling:

Q. Now, just so that we get this straight, that would mean he was across Twentieth Avenue and to your left as you were facing the crossing point? A. Yes.

Q. And that is about a block away?

The Court: Is that a block? 30

A. Yes, a block away.

Q. It is a full block, but it is a short block. Now, when did you look up and down the street the first time? After you were in front of this parked automobile? A. Yes.

Q. Is that when you looked up and down the street? A. Yes.

Q. You looked both ways? Did you look down to your left? A. Yes. 40

*Michael Maloney, for Plaintiff—Cross.*

Q. And was anything coming then? A. No, there was no cars in the distance on my left.

Q. Nothing at all? A. No.

Q. And you looked to your right? A. There was an old truck coming.

10 Q. Where was the truck? A. In the middle of Dover Street, between Dover and Lewis.

Q. You are sure about that? You waited for that to pass? A. Yes.

Q. Did you look again before you started out? A. No.

Q. So that you and Jimmy, after the truck went by, without looking again just started across the street? A. A half trot.

Q. Half trot, the same as Jimmy said? A. Yes.

20 Q. Did you go with him? A. No. I was just ready to start when he got hit.

Q. You were not half trotting yet? A. No.

Q. You stayed there? A. Yes.

Q. And he half trotted. How far did he trot? A. He got into about the middle of the road.

Q. How far is that from the parked automobile? A. Around eight feet.

Q. Can you show me something in the courtroom here?

30 The Court: He said eight feet. Now, if you want to check on the distance—he just said eight feet.

Mr. Fryling: I didn't hear it. I am sorry.

Q. How far is eight feet? Can you show me something?

40 The Court: Tell us what you think is eight feet from where you are sitting, out in front of you.

*Michael Maloney, for Plaintiff—Cross.*

Mr. Duffy: Tell me when to stop, Michael.

A. About that (indicating).

Q. That is how far Jimmy got before he was hit? A. Yes.

Q. Were you looking at him when he was hit? 10  
A. Yes.

Q. And you saw what part of the car hit him?  
A. The front.

Q. What part of the front? A. The left side.

Q. The left side? Are you sure about that? A.  
Yes.

Q. When did you decide it was the left side of  
the front? A. I seen it.

Q. You saw that? A. I could see the car eight  
feet before it hit him. 20

Q. And you saw that Jimmy had gone eight  
feet? A. Yes.

Q. And you knew ever since the time of the  
accident that that is how far he had gotten? A.  
Yes.

Q. You saw this car coming before it hit  
Jimmy? A. Around eight feet I saw it.

Q. Around eight feet away? A. Yes.

Q. Eight feet away from you? A. Yes.

Q. Or eight feet from Jimmy? A. Eight feet  
from me. 30

Q. And as it traveled that eight feet to where  
it hit Jimmy you could see how fast it was going?  
A. Yes.

Q. And you saw it was going quite fast? A.  
Yes.

Q. What do you mean by quite fast? A. Well,  
I seen many cars going, and they go quite fast,  
and I could see he was going quite fast.

Q. Going the same speed as other cars on that  
street? 40

*Michael Maloney, for Plaintiff—Cross.*

Mr. Duffy: He didn't say that, if your Honor please.

The Court: He didn't say anything about other cars, did he?

Mr. Fryling: Maybe I misunderstood him. I thought he did.

10 The Court: You can ask him how he gauges the speed of cars, but until he says so don't you say it.

Mr. Fryling: I am sorry. I thought I heard him say something about other cars.

Q. Now, when you saw this automobile coming up the street eight feet away it was passing the parked automobile that you were in front of, wasn't it? A. Yes.

20 Q. It was pretty near the front end of that car? A. (No response.)

Q. You shake your head. Will you speak the answer? A. Yes.

Q. Jimmy was right in front of you then? A. Yes.

Q. And I believe you said about eight feet out towards the center of the street. Do you know how wide that street is? A. Around thirty or thirty-five.

30 Q. Michael, do you remember in December, 1939, two days after Christmas when a man from the Public Service came to see you? A. I don't remember.

Q. You don't remember anyone coming to see you? A. No.

Q. And asking you about this accident? A. Nobody came to see me.

Q. Nobody came to see you at all? Are you sure about that? A. Yes.

40 Q. Ever since the time of this accident; is that correct? A. Yes.

*Michael Maloney, for Plaintiff—Cross.*

Q. Did anyone from Mr. Duffy's office come to see you? A. Yes. I went to Mr. Duffy's office. I spoke to him about it, and I spoke to Mr. Sproviere.

By the Court:

Q. What was that last? A. I spoke to Mr. Duffy about it and I spoke to Mr. Sproviere about it, and I spoke to some other people. 10

Q. But you say that no one from the Public Service ever came to see you? A. Nobody from the Public Service came to see me.

Q. You are sure about that? A. Yes.

Q. Did anyone excepting Mr. Duffy or Mr. Sproviere talk to you about this case? A. Yes, I was talking to Jimmy about it, and his father and mother, and my mother. 20

Q. Anyone else? A. And some other people, too.

Q. Who were they? Playmates of yours? A. Yes.

Q. But no man from the Public Service? A. No man from the Public Service.

Q. You are absolutely sure about that? A. Yes.

Q. And you were not asked to sign a statement? A. No.

Q. You were not asked any questions about this accident by anyone from the Public Service at any time? A. No. 30

Q. Your memory is perfectly clear on that? A. Yes.

Q. Do you know how to write? A. Yes.

Q. Do you know how to sign your name? A. Yes.

Q. By the way, did you ever see this gentleman before? A. He delivered a subpoena to me. 40

*Michael Maloney, for Plaintiff—Cross.*

Q. That is the first time you saw him? A. Yes, that is the only time.

Q. And that was when? A. Last night.

Q. That is the first time you ever saw him? A. Yes.

10 Q. He never asked you about this accident? A. No.

By the Court:

Q. You never saw him before last night when he gave you the subpoena? A. Only last night I saw him.

Q. When he gave you the subpoena? A. That was the first time I seen him.

20 Q. The first time you ever saw him? A. Yes.  
By Mr. Fryling:

Q. Do you see the name on the bottom of this paper? A. Yes.

Q. Is that your name? A. Yes.

Q. And is it your signature? A. Yes.

Q. You signed that yourself? Yes.

Q. And on the second page is that your signature, too? A. Yes.

30 Q. You signed that yourself? A. Yes.

Q. Where did you sign these papers? A. I don't remember.

Q. Did you sign them at your home? A. I don't remember.

Q. Do you know who was present when you signed these papers? A. No.

Q. You don't remember that your mother and father were there? A. I don't remember.

40 Mr. Fryling: May I ask to have the papers marked for identification?

*Michael Maloney, for Plaintiff—Cross.*

(Two papers marked D-1 for Identification.)

Q. Now, Michael, did you ever read these two papers? A. No.

Q. You never read them; just signed your name at the bottom? You can read, can't you? A. Yes. 10

Q. You can read English? A. Yes.

Q. One more thing, Michael. On the second page, up above what you said was your signature, is that one line in your handwriting? A. Yes.

The Court: The answer is, "Yes."

Q. What does it say, the part that is in your writing? A. "I have read this and this is true."

Q. You wrote that yourself? A. Yes. 20

Q. Now, you don't remember reading this paper? A. No.

Q. Well, when you did write this, "I have read this and this is true," did you know what you meant when you wrote that? A. I don't remember.

Q. Can you answer? A. I don't remember.

Q. Do you know what it means to tell the truth? A. Yes.

Q. You told Judge Wolber that you did. And yet you sit there, having sworn to tell the truth on the Bible, admit that this is your signature, Michael, that you wrote, "I have read this and this is true," and yet you tell us now that you don't remember seeing this man, you don't remember talking about this accident, you don't remember where you signed these papers, or who was there? Now, you do remember, don't you? A. I don't remember. 30

Q. You don't remember anything about it? A. No. 40

*Michael Maloney, for Plaintiff—Cross.*

Mr. Duffy: May I see that, please, Counsel?

Mr. Fryling: It is not in evidence.

Q. Michael, do you still say that you didn't talk to this gentleman?

10

Mr. Duffy: Now, I object to that, if the Court please. He said he didn't remember, Judge Wolber, having spoken to him. He signed it. He didn't deny it categorically or admit it.

20

The Court: We have an infantile witness here, a young person. I am going to permit that again. I have a right to, in my discretion, whether it was said four times. He can ask that child again. I will permit that question. I think I will. Is there an objection?

Mr. Duffy: Yes.

The Court: I shall overrule the objection.

Mr. Duffy: Allow me an exception.

The Court: Allow you an exception. Proceed, Mr. Fryling.

(The last question was read by the reporter.)

30

A. I never talked to him. I only seen him last night the first time.

The Court: "I never talked to him. I only saw him last night the first time."

40

Q. You don't remember him being in your house and your mother calling you in from outside where you were playing? A. I don't remember.

*Michael Maloney, for Plaintiff—Cross.*

Mr. Duffy: Maybe if counsel is more specific as to the time and date it might refresh the witness's recollection.

Q. Three P. M., December 27, 1939, at your home. That is the time I am talking about. Now, does that help you remember, Michael? Think hard. Maybe you can remember. A. I was playing about that time. 10

The Court: You were what?

Q. You were playing about that time? A. Playing.

By the Court:

Q. Playing? What do you mean, playing? A. I was playing with another boy. 20

Q. This is two days after Christmas, a year ago last Christmas. Not the last one, but the one before. Two days after; is that right? A. Yes.

Q. That is the date he is talking about. Do you remember seeing Mr. Busch at that time, that gentleman sitting there? A. I never seen him, only last night.

Q. Did you ever talk with him or did he ever talk with you? Are you pretty sure you didn't do it? A. Yes. 30

By Mr. Fryling:

Q. Do you remember on December 27, 1939, at about three o'clock in the afternoon when you were out playing your mother calling you in the house and telling you to tell this gentleman the truth about the accident?

(The question was read by the reporter.) 40

*Michael Maloney, for Plaintiff—Cross.*

A. Yes, my mother did call me in.

Q. She did call you in? A. Yes.

Q. You remember that now? A. Yes.

Q. And that is December 27, 1939? A. Yes.

Q. You can remember that part, that you had been playing? A. Yes.

10 Q. Was your uncle there or was it your father?

A. I think my father was there.

Q. You think your father was there. Do you remember your mother telling you to tell the truth about the accident? A. Yes.

Q. You remember that part now. And did you tell somebody the truth about the accident that afternoon? A. Yes.

Q. And did you read it over, what he had written down? A. I think so.

20 Q. You did. And then you signed the paper that he gave you and that you had read over? A. Yes.

Q. And that is the paper that you just saw? A. (No response.)

Q. Now, do you remember that it was Mr. Busch that you told those things to? A. I don't remember.

Q. You don't remember that? You still say you never saw him? A. Yes, sir.

30 Q. But your recollection as to talking to somebody that afternoon— A. Yes.

Q. (Continuing)—has changed? A. Yes.

Q. And your recollection as to having read this paper over has changed? A. Yes.

Q. And what you said before about never having read this paper was false, wasn't it? A. Yes, sir.

40 Q. Now, whoever that man was, Michael, didn't you tell that man that as soon as the truck had gone on we started running?

*Michael Maloney, for Plaintiff—Cross.*

Mr. Duffy: Wait a minute, Michael. I object to that, if the Court please.

The Court: Why? This is preliminary to impeaching his credibility.

Mr. Duffy: By the use of the statement?

The Court: Yes. They have to call his attention to what was contained in that particular paper now. He has to ask that witness, and then if it is contradictory that paper, if it is properly authenticated can go into evidence on the defendant's case. It is preliminary. If that hasn't been done, if he—

Mr. Duffy: I will withdraw the objection, Judge Wolber.

The Court: Yes. Do you see what I mean?

Mr. Duffy: I understand perfectly now.

The Court: That is the rule of evidence. That is what that is. Proceed.

Mr. Fryling: I will withdraw the question for the present.

The Court: The Altieri case is the leading case in the State.

Q. Michael, on December 27, 1939, at three o'clock in the afternoon, at your home, didn't you tell that man, whoever it was, that on April 10, 1939, about four o'clock in the afternoon, you were playing in front of your house with James Rizio?  
A. Yes.

Q. That your house faces Dover Street, which runs into Twentieth Avenue? A. Yes.

Q. That on our side of the street there were three automobiles parked at the curb facing east?  
A. Yes.

*Michael Maloney, for Plaintiff—Cross.*

Q. That you were standing in front of the first automobile? A. Yes.

Q. That you were looking at a boy who was sitting in his wagon, facing west on the opposite side of the street? A. Yes.

10 Q. That you and Rizio decided to chase him? A. Yes.

Q. That a big truck passed in front of us? A. Yes.

Q. In front of both of you? A. Yes.

Q. That you then looked both ways? A. No, we looked both ways before we seen the truck.

Q. But did you say this, what I am just asking you, to the man that was at your home? A. Yes.

20 Q. And you say now that what you told him that afternoon about looking both ways after you saw the truck is wrong?

Mr. Duffy: Now, if the Court please—

Q. You had seen the truck—

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

30 The Court: He has admitted it. He says he told him that. That is comment or argument. In other words, he reads from a statement. As I gather from the statement, the boy looked and made the observation after that truck passed, and he says yes, he told him that. Do you see what I mean? What is your point?

40 Mr. Duffy: I defer to the Court's ruling about counsel being permitted to interrogate this witness about the statement and its contents. I have no quarrel with that whatsoever. I was wrong about that, as frequently happens, as far as I am con-

*Michael Maloney, for Plaintiff—Cross.*

cerned. Now, in this statement there is a recitation that Jimmy and this boy looked both ways. Now, I have no objection if counsel asks the witness, "Did you in this statement to this anonymous person say we looked both ways before we started, and didn't you say a little while ago that you looked only one way and then started"? I have no quarrel with that, but duplicitous questions, argumentative questions, fourteen or fifteen questions in one, I must object to. 10

The Court: Well, you have the right to, but did the witness go ahead and say he did tell the man that, even though it was different from what he testified here today in that particular? 20

Mr. Duffy: Let it come that way.

The Court: Go ahead. Don't put argumentative questions. You are absolutely right about that.

Q. Now, continuing with what you told that man that same afternoon, didn't you also say that the truck had then gone on; as soon as it did we started running? A. Yes.

Q. Rizio was in front and I was behind? A. Yes. 30

Q. Rizio got about two or three feet away from the car where we were standing and toward the middle of the street when he was struck by the right front fender? Did you say that? A. Yes.

Q. You did. And you were telling that man the truth? You also told that man, did you, that the car was going quite fast? A. Yes.

Q. And you also told him, did you not, that you did not see the automobile before it struck Rizio? A. Yes. 40

*Michael Maloney, for Plaintiff—Re-direct.*  
*David Mornick, for Plaintiff—Direct.*

Q. And that was true, wasn't it? A. Yes.

Q. Did you also tell him that you stopped running in time to avoid being hit? A. Yes.

Q. And that was true? A. (No response.)

10 Q. You also told him that the automobile stopped right away? A. Yes.

Q. That another car pulled up and some man picked the Rizio boy up and took him to the hospital? A. Yes.

Q. That the Winterberg boy, who was the one across the street, then went and told Rizio's mother? A. Yes.

Q. And that was all you knew about the accident? A. Yes.

20 Q. You told him all of that, and everything that you told him was true excepting that business about when you looked up and down the street? A. Yes.

Q. Your memory is pretty good now, isn't it? A. Yes.

Mr. Fryling: That is all.

*Re-direct examination by Mr. Duffy:*

30 Q. Michael, when you told the person who came to your house in December that the car was going fast, was that correct? A. Yes.

Mr. Duffy: That is all.

---

DAVID MORNICK, sworn.

*Direct examination by Mr. Duffy:*

40 Q. Mr. Mornick, where do you live? A. Right now at 322 Market Street.

*David Mornick, for Plaintiff—Cross.*

Q. On April 10, 1939, where did you live? A. 195 Beach Street.

Q. Where are you employed? A. At the present time, Wright's Aeronautical.

Q. And at that time where were you employed? A. WPA.

Q. I beg your pardon? A. A WPA project. 10

Q. WPA. Did someone serve you with a subpoena in this case? A. They did.

Q. Who was it? A. Mr. Wabash. (Busch?)

Q. For the Public Service? A. That is right.

Q. Were you in the vicinity of Twentieth Avenue and Dover Street on April 10, 1939? A. I was.

Q. Did you see the plaintiff, James Rizio, Junior, there? A. I did.

Q. Did you see the car that struck him on that day? A. Also. 20

Q. Did you see the car that struck Jimmy before it struck him? A. I did.

Q. Could you approximate the speed at which it was going? A. Between twenty-five and thirty.

Q. When you say between twenty-five and thirty, what do you mean? Twenty-five or thirty miles an hour? A. Twenty-five miles an hour, approximately.

Mr. Duffy: No further questions. 30

*Cross examination by Mr. Fryling:*

Q. You saw the accident, in other words? A. I did.

Q. Did you see where the boy had come from?

Mr. Duffy: Now, I object to that.

The Court: I am afraid that goes beyond the scope of the direct examination, Mr. Fryling. What he testified to, as I got it, 40

*David Mornick, for Plaintiff—Cross.*

was that he was in the vicinity of this location on April 10, 1939; he saw a car that struck the boy; and that car was going between twenty-five and thirty miles per hour, approximately.

Mr. Fryling: And that he saw the boy.

10

The Court: Yes. Well, now, wait a minute. Did he say he saw the boy? Did he see J. R.?

Mr. Duffy: Yes, I asked him if he saw James Rizio at the time of the accident.

(Testimony from direct examination read by the reporter.)

The Court: Is there an objection?

Mr. Duffy: Yes.

20

The Court: Objection overruled. Allow you an exception. Proceed.

Q. Did you see where he came from, Mr. Mornick? A. I did.

Q. Where? A. He came from the sidewalk on the south side of Twentieth Avenue, going towards the north, toward Dover Street.

Q. What did he do?

30

Mr. Duffy: I object to that.

A. What did he do?

The Court: Well, anything he observed he could tell, because your question was very general, whether he saw Jimmy at that time, not at any particular place except that location. That is the reason I allowed that question.

Mr. Duffy: I press the objection.

40

*David Mornick, for Plaintiff—Cross.*

The Court: Objection overruled. Allow you an exception.

Q. What did he do then? A. He ran across the street; that is, he attempted to run across the street until he was struck.

Q. From where, and how far did he get? A. 10  
He ran from the south side of Twentieth Avenue, facing Dover Street, going north. He got, I would say,——

Q. You say from the south side of Twentieth Avenue. What do you mean? A. That is the south side of Twentieth Avenue facing east on Twentieth Avenue, and he started across facing north.

Q. Now, where did he start running? From the curb or the sidewalk or from the street? A. From 20  
the dirt part of the sidewalk. There is a little parkway.

Q. Did he run slowly or fast? A. I would say he ran normally, a normal rate of running, like a child would do.

The Court: What do you mean?

Mr. Duffy: A jog?

The Witness: He ran, in other words.

By the Court: 30

Q. Wait. You can't be running at a normal rate, because it depends upon the circumstances.

A. That is right.

Q. What was it? Was it fast or was it slow or what was it? A. It was fast running. I wouldn't say he was trotting; he was running.

Q. It was faster than a walk? A. That is right.

Q. Was he running fast or running slowly? A. I 40  
would say fast, your Honor.

*David Mornick, for Plaintiff—Cross.*

By Mr. Fryling:

Q. And he ran from the sidewalk or the dirt part in front of this sidewalk out towards the middle of the street? A. Right.

10 Q. Now, as he ran that distance can you tell me whether or not he looked in either direction up and down the street? A. He looked east, as I saw, and he waited for this truck to pass, and as this truck passed he started across the street.

Q. Did he look west? A. That I couldn't say, because the parked car would block his vision.

Q. Now, when he started running out from behind this parked car——

The Court: From behind?

Mr. Duffy: The front.

20

Q. From the front of the parked car, where was that automobile that you saw? A. The automobile—he did run from behind, because the automobile was parked on the wrong side of the street. It was facing west, and I did take the license plate of the car.

By the Court:

30 Q. Wait a minute. Wait a minute. You say that automobile on the south side of Twentieth Avenue was parked on the wrong side of the street? A. Yes, your Honor, I do.

Q. So that its front was facing west? A. Facing west, yes.

By Mr. Fryling:

40 Q. Well, now, as this boy ran from what you say is behind the parked car, how far away was the automobile that a second later collided with him? A. Seven feet.

*David Mornick, for Plaintiff—Re-direct.*

Q. Seven feet from where? A. From where the boy was behind the car.

Q. What did the automobile do? A. The automobile, as the child came from behind the car, he swerved to the left to try to avoid the accident.

Q. That was to the driver's left? A. To the driver's left.

10

Q. And did the automobile come to a stop? A. He did after.

Q. When it came to a stop where was the boy? A. The boy was laying in the middle of the road then.

Q. About how far from the automobile? A. About ten feet.

Q. He rolled there? A. He did.

Q. Mr. Mornick, you also were subpoenaed to come here by the Public Service? A. That is right.

20

Q. And you have given them a statement? A. I have.

Q. You signed a document— A. I did.

Q. (Continuing)— setting forth what you knew about this accident? A. Yes, I did.

Mr. Fryling: That is all.

*Re-direct examination by Mr. Duffy:*

30

Q. Mr. Mornick, you say the boy stepped off the curb and stopped? A. I said the boy ran off the curb.

Q. And stopped, did he? A. He didn't stop.

Q. Didn't he stop for the truck to pass? A. He was on the sidewalk.

Mr. Fryling: I object to that as not proper re-direct examination.

40

*David Mornick, for Plaintiff—Re-direct.*

A. He waited for the car.

The Court: Wait a minute. I think those things were brought out on your cross and I think he has a right—

10 Mr. Fryling: Yes, but the question as framed is a cross examining question.

The Court: You mean leading?

Mr. Fryling: As to the form of it.

The Court: Oh, yes. Reframe your question, Mr. Duffy.

Mr. Fryling: This is the plaintiffs' testimony.

20 Q. You were not subpoenaed by me, were you, Mr. Mornick? A. No.

Q. You were subpoenaed by the Public Service?

A. Yes.

Q. You gave them a statement? A. Yes.

Q. You didn't talk to me about it in my office at any time? A. Yes.

Q. To me? A. Yes.

Q. When was that? A. Your assistant,—

Q. Did you ever talk to me? A. (Continuing) — introduced me to you and told you that I was there the day the accident happened and so forth.

30 Q. And we talked about it in the hallway today? A. On Church Street, yes.

Q. And you told me then, isn't it true, Mr. Mornick— A. I did.

Q. (Continuing)— that the car was going twenty-five or thirty miles an hour? A. I did.

Q. And it was true then, wasn't it? A. It is true yet.

Q. That is all I want. Thank you. That is all.

*David Mornick, for Plaintiff—Re-cross.*

*Re-cross examination by Mr. Fryling:*

Q. And you talked to Mr. Sproviere? A. In his office. They sent me a letter to come down to them and I went to them and I told them I had already made my statement, and if they wanted to verify it they could look it up.

10

Q. You told the same thing to the investigator for whom you signed the paper? A. Yes.

Q. And to Mr. Duffy, Mr. Sproviere— A. That is right.

Q. (Continuing)— and today in court? A. I did.

Q. And it is true each time you have said it? A. It is.

Mr. Fryling: That is all.

The Court: Ladies and gentlemen of the jury, as I told you, I have to go up to Newton tomorrow to sit up there and hear a matter. For that reason, I am going to suspend court until Thursday morning. I will ask you not to discuss this case among yourselves or with anyone. It has just started. Court will stand adjourned until Thursday morning at ten o'clock.

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(Adjourned to March 27, 1941, at 10 A. M.)

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*James Caspell, for Plaintiff—Direct.*  
*Thomas Arthur Clay, for Plaintiff—Direct.*

Paterson, N. J., March 27, 1941.

(Trial of the Cause Resumed at 10 A. M.)

JAMES CASPELL, SWORN.

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*Direct examination by Mr. Duffy:*

Q. Mr. Caspell, where do you live? A. 167 Twentieth Avenue, Paterson.

Q. And what is your business or occupation? A. Plumbing and steam fitting.

Q. On April 10, 1939, where did you live, Mr. Caspell? A. 167 Twentieth Avenue.

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Mr. Duffy: Judge Wolber, Dr. Clay is here and he has made a request that he be permitted to testify.

The Court: Do you wish to withdraw the witness?

Mr. Duffy: Any objection, Mr. Fryling?

Mr. Fryling: I have no objection.

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THOMAS ARTHUR CLAY, SWORN.

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*Direct examination by Mr. Duffy:*

Q. Dr. Clay, with what hospital are you connected? A. Paterson General Hospital.

Q. You are a practicing physician of the State of New Jersey? A. Yes, sir.

Q. And you have been for how long, Doctor? A. Since 1903.

40

Q. With what institutions other than the Paterson General Hospital are you connected? A. None.

*Thomas Arthur Clay, for Plaintiff—Direct.*

Q. How long have you been connected with the Paterson General Hospital, Doctor? A. Since 1905.

Q. Where is your office? A. 351 Totowa Avenue, Paterson, New Jersey.

Q. Doctor, on or after April 10, 1939, did you have occasion to visit and treat James Rizio? A. 10 Yes, sir.

Q. And where did you first see him, Doctor? A. I saw him in the Paterson General Hospital.

Q. On what date? A. April the 10th, 1939.

Q. And in what part of the hospital was he, Doctor? A. He was on my surgical service, ward service.

Q. Will you explain to the Court and jury what his condition was when you first saw him, Doctor? A. Well, he came into the hospital with a history of an automobile accident. He had a hematoma on the left side of the forehead, laceration behind the left ear one inch long which had required one suture to close, bleeding from the left ear. The X-ray showed that he had a fracture of the skull, and on the 15th of April he complained of double vision and developed a paralysis of the sixth cranial nerve, which controls the abduction, the turning outward of the left eye on the left side of the face. 20 30

Q. Doctor, when you began reciting your observations you used the word "hematoma." What does that mean, Doctor? A. Hematoma means the collection of blood under the tissues. A person gets a blow, some small veins are torn, the blood comes out and tries to force its way out, finds its lowest level, and there is a lump left, and that lump or bump we call a hematoma. It means a collection of blood under the skin. 40

*Thomas Arthur Clay, for Plaintiff—Direct.*

10 Q. Doctor, did you notice anything unusual about either of the boy's eyes as a result of the rupture of these muscles? A. His eyes were all right until the 15th of April, that is, five days after he came in, and it was noticed that his left sixth nerve, that is the nerve that controls the turning out of the left eye—the sixth nerve was paralyzed, and of course that gave him a squint, a squint in his eye, a convergent squint.

Q. Did it cause the eye to assume any position other than the normal one, Doctor? A. The eye turned out.

Q. Would that be toward the nostril or out from it? A. No, it turned in because this sixth nerve was paralyzed.

20 Q. And when you say "turned in," do you mean it turned in towards the nose? A. Yes.

Q. Doctor, in your opinion, was this unusual position of the eye due to the trauma or blow? A. I think so, because he had a fractured skull, was knocked out. It was due to the resulting paralysis of the nerve.

Q. From what particular part of his head or body was he bleeding, Doctor when you saw him? A. The left ear, the same side.

30 Q. Was he conscious when you first saw him? A. Yes, sir.

Q. Did he complain of pain? A. No. The boy had very few complaints.

40 Q. What was it necessary for you to do, Doctor, in the treatment of the boy? A. Well, he was put to bed, given an ice cap to his head; he had a spinal tap which showed the spinal fluid contained no blood; he had an X-ray which showed he had a fractured skull; he was examined by a neurologist.

*Thomas Arthur Clay, for Plaintiff—Direct.*

Q. Where? Will you point out on your own head, Doctor, where the fracture was, for the benefit of the Court and jury? A. In this region (indicating). He had what we call a mastoid-occipital, that is the junction of the mastoid bone and the occipital bone. The suture spread. He had the mastoid-temporal suture broken, and two linear fractures, one to the temporal bone and the other back toward the occiput. 10

By the Court:

Q. Do you remember which side it was, Doctor?

A. All the left side.

Q. All the left side? A. Yes, sir.

By Mr. Duffy:

Q. Doctor, how many fractures or separations were there? A. Well, if you count the separations of the sutures and the other, there were four fractures. 20

Q. Four fractures? A. Yes, sir.

Q. Now, do you have the X-rays, Doctor? A. No, sir. Dr. Warren is here in court and he has the X-rays.

Q. Do you have them, Dr. Warren? A. I would rather he do it. 30

Q. You would rather he did it? A. Yes, sir. He is here. He is the man who took them.

Q. Well, did these X-rays, Doctor, taken by Dr. Warren, assist you in making your diagnosis? A. Yes, sir. I looked at them under the light box.

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

The Court: He is just trying to identify them. He said he used them. 40

*Thomas Arthur Clay, for Plaintiff—Direct.*

A. Yes, sir. I took the X-rays down to the light box.

By the Court:

Q. Did you use these particular X-rays? A. Yes, I did.

10

Mr. Fryling: The objection is on the basis there has been no foundation laid for it.

The Court: They are not coming in yet. It is just that the doctor used them. Now, for instance, if they are not authenticated, then——

20 A. I ordered the pictures taken and they were taken by Dr. Warren. I read the report; I went to the X-ray and studied the pictures and looked at them.

Q. What do you mean by going to the X-ray? A. We have an X-ray room.

Q. You went to that room? A. We don't study these pictures under the ordinary light. We take them down and put them in the light box and study them.

30 By Mr. Duffy:

Q. Did you do that in this case, Doctor? A. Yes.

The Court: Do you press an objection, Mr. Fryling?

Mr. Fryling: No, I will withdraw the objection.

40 Q. Are these the X-rays, Doctor, from which you made that diagnosis about the four fractures?

*Thomas Arthur Clay, for Plaintiff—Direct.*

Do you want the shadow box? A. No. I say this is Dr. Warren's job.

Q. Very well.

By the Court:

Q. You say those X-rays were made at your direction, Doctor, in connection with your handling of the case? A. The system is that you write on the X-ray card the name, the time of day, the room he comes from, what kind of pictures you want made, and they are made. The report is sent to the ward, not the X-ray. Then you go down and check the report against the X-ray. I did that. 10

The Court: Shouldn't they be marked for identification? 20

Mr. Duffy: Yes.

(X-ray films marked P-3, P-4, P-5, P-6, P-7, P-8, P-9, and P-10 for Identification.)

By Mr. Duffy:

Q. Doctor, will you describe to the Court and jury the course of treatment you prescribed for James Rizio, Junior? A. Well, the treatment was rest in bed, ice cap, spinal tap, X-ray, and when he got well enough to go home, send him out, and refer him to an eye doctor for treatment. 30

Q. How long did he stay in the hospital, Doctor? A. He left the hospital on the 30th day of April, 1939.

Q. During that time, how frequently did you visit him? A. Oh, I saw him sometimes twice a day, and anyway every day.

Q. And was it at your suggestion, Doctor, that he went to an eye specialist? A. I referred him to an eye specialist. 40

*Thomas Arthur Clay, for Plaintiff—Direct.*

Q. Doctor, after he was discharged from the hospital did you treat him? A. He came to my office during May and part of June. I discharged him June 10th, I think, as I had done all I could, that he should go to an eye man for treatment.

10 Q. How many times from the date of his discharge from the hospital until June, when you discharged him, did he come to your office, Doctor? A. Five.

Q. Five? A. Yes.

Q. Doctor, are you familiar with or acquainted with the hospital records in this matter? A. By the way, the date was June the 5th, the last time he was seen by me, not the 10th. Yes, sir, I am.

Q. Doctor, are these records the records in the case of James Rizio, Junior? A. Yes, sir.

20

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

(Papers marked D-11 for Identification.)

Q. Doctor, what do these records contain?

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

The Court: They will speak for themselves if they are needed. The doctor identified them as the hospital records.

30

Q. Doctor, did you submit a bill in this matter? A. Yes, sir.

Q. In what amount, Doctor? A. \$85.

Q. How much? A. \$85.

Q. Do you consider that to be a reasonable charge for your services? A. I do.

40 Q. Doctor, are you aware presently of whether or not the eye condition has disappeared? A. I haven't seen him since the 5th of June.

*Thomas Arthur Clay, for Plaintiff—Cross.*

Q. Doctor, did the boy, during his stay in the General Hospital, complain of double vision? A. Yes, sir, he had double vision, but before he left the hospital the double vision had cleared up.

By the Court:

Q. Before he went to the hospital? A. Before he left the hospital the double vision had cleared up, and on April 29th his external squint had— or his squint of the eye due to a paralysis of the left sixth nerve had improved fifty per cent. 10

By Mr. Duffy:

Q. When he was discharged from the hospital fifty per cent. had disappeared and fifty per cent. remained? A. Well, we figured he had fifty per cent. loss of the power to move that eye, due to paralysis of the left sixth nerve, involving the external rectus of the left eye. 20

By the Court:

Q. When he left the hospital? A. When he left the hospital and on June the 5th the same.

Q. The last time you saw him? A. The last time I saw him it was the same.

Mr. Duffy: That is all. Cross examine. 30

*Cross examination by Mr. Fryling:*

Q. Doctor, did this boy at any time that you saw him tell you how the accident happened?

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

The Court: How would that bear? The only thing the doctor gave with respect to 40

*Thomas Arthur Clay, for Plaintiff—Cross.*

the history was a history of an automobile accident. Now you are using him to testify as to admissions by the boy?

Mr. Fryling: As to the details of that history and as to admissions against interest.

10 The Court: He is on cross examination now, and he didn't bring anything out on direct.

Mr. Fryling: The history of an automobile accident, your Honor.

The Court: Only of an automobile accident.

Mr. Fryling: Yes, sir.

The Court: How did you put that question?

20 (The question was read by the reporter.)

The Court: Do you press your objection?

Mr. Duffy: Yes, sir.

The Court: Overruled.

Mr. Duffy: Do I understand the witness is going to be permitted to testify about history?

30 The Court: With respect to the accident, because you brought out on direct examination that he gave him the history of an automobile accident.

Mr. Duffy: I didn't bring anything of the sort out. It was mentioned by Dr. Clay.

The Court: Well, now, Mr. Duffy, I am going to see whether he used the word automobile accident. I heard it. I may be wrong, but I doubt it.

40 Mr. Duffy: I remember Dr. Clay said he was given a history of an automobile accident, and that is all.

*Thomas Arthur Clay, for Plaintiff—Cross.*

The Court: That is it. That is true.

Mr. Duffy: He didn't say by whom.

The Court: All right. No details, but a history of an automobile accident.

Mr. Duffy: No details, and not by him, not by Judge Wolber, not by Vincent Duffy, not by a member of the jury. 10

The Court: I know that. I know that.

Mr. Duffy: It might have been by an interne or a nurse.

The Court: But on cross examination, since the doctor said generally history of automobile accident, why can't he on cross examination ask him what he said?

Mr. Duffy: An inquiry to him?

The Court: Yes.

Mr. Duffy: As to what who said, Judge Wolber? 20

The Court: The boy.

Mr. Duffy: He didn't say the boy told him anything. He said he had a history of an automobile accident.

The Court: Anything else, Mr. Duffy?

Mr. Duffy: Yes. I mean, I am pressing the objection, Judge Wolber.

The Court: I am overruling it. You may have your exception, if you wish. 30

A. What do you want to know?

(The last question was read by the reporter.)

A. I examined this boy—

By the Court:

Q. Did he? Say yes or no, Doctor. Did he tell you? A. Yes. 40

*Earl L. Warren, for Plaintiff—Direct.*

By Mr. Fryling:

Q. And what was it that he said, and when?

10 Mr. Duffy: I object to that, if the Court please, on the same ground, that this not the proper subject of cross examination. There was no allusion to the boy having said anything to Dr. Clay on the direct examination by the doctor but the general statement that he got a history of an automobile accident. That is not sufficient to permit counsel to make any inquiry on cross examination as to what the boy said, and I object.

The Court: Overruled. Allow you an exception.

20 A. On April 29, 1939, this boy stated he was standing in the gutter and he was hit by an automobile, hit by something, not sure whether it was an automobile or not.

Q. I didn't get that. He was standing in the gutter and was hit by something? A. Yes.

Q. He was not sure whether or not it was an automobile? A. Yes, sir.

Q. That is all, Doctor.

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EARL L. WARREN, SWORN.

*Direct examination by Mr. Duffy:*

Q. Dr. Warren, what is your full name? A. Earl L. Warren.

40 Q. And with what institution are you connected, Doctor? A. The Paterson General Hospital and Passaic General Hospital.

*Earl L. Warren, for Plaintiff—Direct.*

Q. How long have you been connected with the Paterson General Hospital, Doctor? A. Since 1937.

Q. How long have you been connected with the Passaic General Hospital? A. 1940.

Q. And what medical school did you graduate from, Doctor? 10

Mr. Fryling: I will admit the doctor's qualifications.

A. The University of Georgia.

Q. Doctor, do you specialize in any particular branch of medicine? A. X-ray.

Q. And are you connected with the X-ray department of the Paterson General Hospital, Doctor? A. Yes, I am. Yes. 20

Q. At the request or direction, or both, of Dr. Clay did you take some X-rays of James Rizio, Junior, in the month of April, 1939? A. Yes.

Q. I show you exhibits P-3 to P-10, inclusive, for identification and ask you if you recognize those. A. Yes, I do.

Q. Are they pictures, X-ray pictures, of the head and other parts of the body of James Rizio, Junior? A. They are pictures of the head.

Q. Did Dr. Clay at any time after the pictures were taken visit the X-ray room and examine them in your presence? A. Yes. 30

Q. And, Doctor, did you assist or collaborate with Dr. Clay in an explanation of those pictures when he did come? A. Yes.

Q. Will you take them now in any order that you please—

The Court: Well, put them in evidence first.

Mr. Duffy: I offer them, Mr. Fryling. 40

*Earl L. Warren, for Plaintiff—Direct.*

Mr. Fryling: I have no objection.

(X-ray films previously marked P-3 to P-10 for Identification now become Exhibits P-3 to P-10, inclusive, in Evidence.)

10 A. These films, taken 4/11/39, four views of the skull, were reported as negative for fracture. Then there was another set.

The Court: I think they should be identified by exhibit numbers. Which ones did he use?

Mr. Duffy: P-8, P-10, and P-9.

A. Those were reported as negative for fracture.

20 By the Court:

Q. They were what, Doctor? Negative? A. Negative for fracture.

Q. They showed which portion of the skull? A. They showed the entire skull. They were four different views. I am sorry, they showed everything except the front of the skull. This is the right side here; this is the left side; right; left. This is the whole side taken this way, and this one is for the back of the skull, taken this way. So that it covers everything except the front of the skull.

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By Mr. Duffy:

Q. Now, P-4, P-3, P-5, P-6, and P-7. A. P-5 and P-7, on this re-examination of the skull, the examination was done differently. The patient's head was placed right down against the plate or film and two pictures of the same area were taken. The X-ray tube was shifted across the skull for a distance of about three inches. Then when we

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*Earl L. Warren, for Plaintiff—Direct.*

come to examine the films we look at them—the two films taken in this direction—with a prism and then we see one film. Now, in these views we see the suture lines here, the occiput, the back of the skull, the mastoid, this area here, the suture line is separated. Also the suture line here between the parietal bone, this bone here, and the mastoid, is also separated and extended up to the front part of the bone here. In this view here, in P-7, there is a little line that extends from this suture, the parieto-mastoid suture here, up over the parietal bone, the side bone here, up to approximately this level here, and that really is the fracture line in the parietal bone. Then this line extends back, down this suture toward the base of the skull here, and there is also a separation of this masto-occipital suture line.

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By the Court:

Q. What do you mean by suture line, Doctor?

A. If you see here, there is a little zigzag spicules of bone that interlock one into the other. You can see that very nicely here. In children those lines are not completely united. In adults you wouldn't see these lines at all, because the calcium fills those things in. That is what we call the sutures.

30

By Mr. Duffy:

Q. Doctor, Dr. Clay made mention of a linear fracture. Will you point that out to the Court and jury? A. It is hard for the jury to see it, but here it is coming up here. It is faintly demonstrable here, but not so well as right here, because of the shift of the tube. A different angulation on the shift of the tube makes a difference in the pictures.

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*Earl L. Warren, for Plaintiff—Direct.*

10 Q. Do exhibits P-3, P-4, and P-6 demonstrate any more clearly the fractures, Doctor? If so, will you point them out to the jury? A. Well, they demonstrate the separation, both at the base of the skull, the bottom of the skull back here, and up the side here. It also demonstrates it here to be wider than—this is on the left side. It demonstrates these sutures here to be wider than the sutures here on the right side.

Q. Would anything be apparent if those sutures were normal, Doctor? A. Would anything be apparent?

Q. Yes, in an X-ray picture. A. It would look like this here.

20 Q. When you say that, they would be fainter lines? A. Yes, they would be much less prominent.

Q. Will you look at P-3 and see whether that would indicate to the jury anything further with relation to fractures? A. Well, unfortunately, on P-3 I can't tell very much, because the film isn't too good.

30 Q. Now, on P-4, Doctor, is there anything there that would be helpful to the Judge and jury? A. Well, P-4 was taken in exactly the same position. It was exactly the same, except there was a shift of the tube, but here the increased width of the suture lines are.

Q. Doctor, how many fractures were there of that boy's skull? A. Well, if you count all the suture lines, each suture line as an individual fracture, there would be four.

By the Court:

40 Q. Are they all of the suture lines? A. All but one.

Q. That is the linear one? A. Yes.

*Earl L. Warren, for Plaintiff—Direct.*

Q. One linear one, and the other three were along the suture lines of the skull? A. Along the suture lines.

Q. Right? A. Yes.

By Mr. Duffy:

Q. Doctor, did you personally submit a bill to this boy's family? A. No, sir. 10

Q. Or was it included in the hospital bill? A. It would be included in the hospital bill.

Q. Doctor, do you remember how much you had included in the hospital bill for your services? A. Well, there wouldn't be any inclusion in the bill for my services.

Q. I am talking about the X-ray. Will you look at exhibit P-11 for identification and see what amount was put in there for X-ray? 20

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

The Court: Of course, if he wants to refresh his recollection—

Mr. Fryling: Unless that is his own record.

By the Court:

Q. Do you know? Do you know what the charge is? A. No, sir. 30

The Court: If he doesn't know, how can you get it in? You can probably get it another way, Mr. Duffy.

A. That is all taken care of through the business office.

Q. You don't know what the amount was, then, do you? A. No, sir. 40

*Earl L. Warren, for Plaintiff—Cross.*

By Mr. Duffy:

Q. Well, would that exhibit, P-11 for identification, refresh your recollection as to how much you did have included in that bill for your X-ray services, Doctor?

10 Mr. Fryling: I object.

The Court: Just a moment. He said he didn't know. I don't see how he is going to be able to tell us. He had nothing to do with the preparation of the paper.

Mr. Duffy: Very well.

Q. Doctor, whatever amount was included in the hospital bill for the X-ray services that you performed, was it reasonable?

20 Mr. Fryling: I object to that.

The Court: How would he know, if he doesn't know the amount?

Q. Doctor, if \$25 was included in the bill for X-rays, would that be considered reasonable?

Mr. Fryling: I object.

Q. For the amount of work?

30 The Court: Wait a minute.

Q. That you have done? A. Yes.

The Court: Just a moment. I sustain the objection and the answer will be stricken.

Mr. Duffy: Cross examine.

*Cross examination by Mr. Fryling:*

40 Q. Doctor, I believe there were four X-rays that were negative for fracture? A. That is right.

*Thomas A. Sanfacon, for Plaintiff—Direct.*

Q. And they were taken the day after? April the 11th they were taken? A. I think so. Yes, April 11th.

Q. Doctor, would you step down here for just a moment? I see a number of lines through the picture of the skull.

The Court: Which one is that? 10

Mr. Fryling: P-6.

Q. Are those lines that go up across the top of the skull across the entire picture in any way related to this accident? A. Which one is that? Which line?

Q. A jagged line going up here to the top, and another one over here. A. Those are sutures, so far as this line is concerned, but this position here is the position of the separation of the suture that I just showed you. This, to approximately this distance, is the separation of the sutures that I just showed you. The remainder of these lines are perfectly normal anatomical sutures in the skull. 20

Q. And had nothing to do with this accident? A. No, sir.

Q. The sutures and the fracture, the one fracture that you described, they would knit together again? A. I believe they would. They should. 30

Mr. Fryling: That is all.

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THOMAS A. SANFACON, SWORN.

*Direct examination by Mr. Duffy:*

Q. Dr. Sanfacon, with what particular institution are you connected? A. St. Josephs Hospital in this city. 40

*Thomas A. Sanfacon, for Plaintiff—Direct.*

Q. How long have you been connected with St. Josephs Hospital? A. I have been there about ten years.

Q. How long have you been a practicing physician in the State of New Jersey? A. About ten years.

10 Q. Do you have any specialty, Doctor? A. Yes.

Q. Do you specialize in any particular branch? A. I do eye work as a specialty.

Q. How long have you been doing eye work, Doctor? A. About ten years.

Q. Where is your office located? A. At 340 Park Avenue in this city.

Q. In Paterson? A. In Paterson.

20 Q. Doctor, sometime after April of 1939 did you have occasion to examine James Rizio? A. I saw this young man July 29th, 1939.

Q. Where did you see him, Doctor? A. At the the office, my own office.

30 Q. What did your examination disclose? A. At the time of the examination the sight of the right was 20 over 20, which is within the normal limits. The inside of the eye and the outside was normal, as far as examination was concerned. The sight, also, of the left eye was within the normal limits. There was nothing wrong with the eyes except—

By the Court:

Q. Nothing wrong what? A. Nothing wrong with the—

40 Q. Left eye? A. With the left eye, except when we checked the muscle balance of the two eyes we found this difficulty: There was a slight paralysis of the left superior rectus muscle of the left eye, and when the boy looked extremely left there was a double vision, and also there was a slight paral-

*Thomas A. Sanfacon, for Plaintiff—Direct.*

ysis of the left external rectus muscle of the left eye, which also gave him, when he looked left, a double vision. That was in July, 1939.

By Mr. Duffy:

Q. Doctor, what, in your opinion, caused this paralysis of the muscle or muscles? A. From the injury—from the history of skull injury and subsequent history, my opinion was at the time and it still is that this defect that he presented at the time was caused by the skull injury received in April, 1939. 10

Q. Doctor, when was the last time you saw the boy? A. March 21, 1941.

Q. Did you examine him then? A. I examined the boy again, and this examination revealed that the right eye is within the normal limits. The left eye has a slight visual defect, a visual defect, but with a lens, with a glass, the sight is improved to within the normal limit. The paralysis of the muscles of the left eye that we found in July, 1939, has now completely improved and the eyes are within the— 20

By the Court:

Q. Are what, Doctor? A. Completely improved. 30

Q. You mean it is gone? A. Yes, the paralysis that showed in July, 1939, is completely improved.

By Mr. Duffy:

Q. Doctor, did you suggest to the boy or his parents that he get glasses? A. No, I did not.

Q. Would that help him? A. The boy now complains of a little ache, aching of the eyes when he reads, and it might be—I would have to check the boy a little more than that to determine 40

*Thomas A. Sanfacon, for Plaintiff—Cross.*

*Mary C. Hayes, for Plaintiff—Direct.*

whether or not a glass would help. It may be that it would help.

Q. Doctor, did you submit a bill? A. Yes, I did, for the examination done in July, 1939.

10 Q. Were there any charges in addition to that, Doctor? A. There was a charge for the examination of March 21, 1941, which the boy paid or the father paid.

Q. What was your entire bill, Doctor? A. I think it was ten dollars.

Q. Did you consider that to be a reasonable charge for your services? A. I think so.

Mr. Duffy: Cross examine.

20 *Cross examination by Mr. Fryling:*

Q. Doctor, is there any way that you can ascertain whether that vision defect in the left eye as now present was caused by this accident? A. There is no way, and I don't think it is.

Mr. Fryling: That is all.

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MARY C. HAYES, SWORN.

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*Direct examination by Mr. Duffy:*

Q. Is it Miss or Mrs. Hayes? A. Miss.

Q. Miss Hayes, you are connected with what institution? A. Paterson General Hospital.

Q. In what capacity, please? A. I am medical record librarian.

Q. Do you have charge of all the records in the hospital, medical records? A. Yes, I do.

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*Mary C. Hayes, for Plaintiff—Direct.*

Q. Are these records, referring to P-11 for identification, the records in the James Rizio case? A. Yes, they are.

Q. Did you have control over the preparation or the maintenance of those records? A. No.

Q. Were they in your care? A. Well, since the patient was discharged.

Q. They have been in your care? A. Yes.

Q. Are you familiar with the charges made, Miss Hayes? A. Well, this is the bill.

10

By the Court:

Q. Are you familiar with them? A. No, I am not.

By Mr. Duffy:

Q. Did you prepare it, Miss Hayes? A. No, I didn't.

Q. Who would prepare that bill? A. The cashier, one of the cashiers.

Q. Could you tell whether or not the charges on that bill were reasonable for the services that are outlined on it, Miss Hayes?

20

Mr. Fryling: I object, if the Court please. This witness is not qualified.

The Court: Do you think that a custodian of records would be qualified to testify as to the correctness of any charges? The lady said she was merely the custodian of the medical records. Is that right, Miss Hayes?

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The Witness: Yes.

By the Court:

Q. You don't prepare these charges, do you? A. No, sir.

40

*Mary C. Hayes, for Plaintiff—Direct.*

Q. Never? A. No.

Q. You have nothing to do with the preparation of the charges? A. No, but when they give me a bill they tell me it is correct.

Q. Somebody else says it is correct? A. Yes.

Q. But you don't know that— A. No.

10 Q. (Continuing.) —unless somebody tells you?  
A. No.

The Court: Is there any question about the amount of the hospital bill?

Mr. Duffy: Mr. Fryling wants the bill—

The Court: Just a moment. We may work it out.

Mr. Fryling: I am willing to stipulate it was \$82.

20 The Court: Yes. Why not?

Mr. Duffy: No.

The Court: How much was it?

Mr. Fryling: I can only go by the bill of particulars. I refuse to stipulate anything over that.

The Court: Well, if you tied yourself down by the bill of particulars, that is the limit that you can claim, of course.

30 Mr. Duffy: Mr. Fryling doesn't want to do that. The bill of particulars indicates a bill of \$82, Judge Wolber.

Mr. Fryling: I will object to any proof beyond that.

The Court: How can you go beyond that, if you tied yourself down to \$82?

Mr. Duffy: Subsequently we received other bills, Judge Wolber, that indicate an amount in excess of that.

40 The Court: Stop there for a minute. Then I shall insist upon knowing when the

*Mary C. Hayes, for Plaintiff—Direct.*

answers to the bill of particulars were furnished. Let us get the date. If there are subsequent bills, bills incurred subsequent to the time, why, they could go in. It must be for hospitalization subsequent to the time.

Mr. Fryling: This is an additional bill of particulars which was received on February 25, 1941. 10

The Court: What is that, \$82?

Mr. Fryling: \$82.

The Court: Mr. Duffy, I am afraid—

Mr. Duffy: That is the only bill we received, in the amount of \$82.

The Court: Well, that will be the amount.

Mr. Duffy: Well, may I please discuss it? I don't want to be foreclosed from any discussion. 20

The Court: You never will be foreclosed, Mr. Duffy, from discussing anything before me.

Mr. Duffy: I understand that, Judge Wolber, but I thought maybe that closed the incident.

The Court: Oh, no.

Mr. Duffy: We subpoenaed the hospital records. The hospital records disclose an amount in excess of the amount of the last bill that the Rizio family turned over to my office. This is the only bill that we ever received. 30

The Court: Is it in excess of \$82? Let me see it.

Mr. Duffy: Here it is, right here.

The Court: Let me see how much it is, without mentioning it.

Mr. Duffy: I shan't mention it. 40

*Mary C. Hayes, for Plaintiff—Direct.*

The Court: Don't mention it. I see there is a difference. Now we are back to this, that when you answered the bill of particulars on February the 25th, 1941, you put down \$82. What is the date of that later bill, the higher amount?

10 Mr. Duffy: March 20, 1941.

Mr. Fryling: If your Honor please, the plaintiff cannot exceed—

The Court: He could. He could if it were for hospitalization subsequent to that time. But there is no testimony in this case—the boy was in the hospital for about thirty days, somebody said; is that right?

Mr. Duffy: Twenty-two days.

20 The Court: All right, say twenty-two days. And it was away back in April, 1939, wasn't it?

Mr. Duffy: Correct, sir.

The Court: Now, then, if, for instance, on February 25, 1941, the answer was that the claim you would make for hospitalization was \$82, and notwithstanding that subsequent to last February—that is February of this year, incidentally—that in March the hospital comes along with a higher bill, I am afraid you are foreclosed. It is just too bad, and I don't see how it can go in if you tied yourself down.

30

Mr. Duffy: Now, without mentioning the amount, Judge Wolber,—

The Court: It is a higher amount.

Mr. Duffy: I can very readily see the discrepancy, because on the bill that was turned over to my office by the Rizio family it indicates ward bed from 4/10, which would be April 10th—

40

*Mary C. Hayes, for Plaintiff—Direct.*

The Court: That is the date of the accident.

Mr. Duffy (continuing): —to 4/20, and then this bill that is attached to the hospital records discloses that it is 4/10/39 to 4/30/39, which more accurately squares with the length of time that the boy was in the hospital. The only point I make here is that we received a bill that doesn't square with the physical facts of the boy's having been in that institution. 10

Mr. Fryling: If the Court please, I think all these remarks are improper.

Mr. Duffy: What?

The Court: They are not improper to ascertain the picture.

Mr. Duffy: I haven't so far made any improper remarks. 20

The Court: I say this, however. I say this in ruling on the question: I am afraid that I must rule that since on February 25, 1941, you tied yourself down to \$82 you have to stand by that and fight out the rest with the hospital outside. It has got nothing to do with the case, don't you see?

Mr. Duffy: Well, now, certainly I don't wish to be repetitious and at the same time be boresome— 30

The Court: You never are that. Don't worry.

Mr. Duffy: The proofs so far, Judge Wolber, have disclosed that the boy was in the hospital for twenty-two days.

The Court: All right.

Mr. Duffy: Now, I am not saying anything improper and I am perfectly willing to follow any suggestions of the Public 40

*Mary C. Hayes, for Plaintiff—Direct.*

10 Service in that direction, but the only bill that we got, and upon which was predicated our answer to that demand for a bill of particulars, indicates a certain charge, and it is an erroneous bill in so far as the number of days is concerned. Now, I am prepared, if counsel won't stipulate, to bring the cashier here to tell that that is the precise number of days that that boy was in the hospital and that it is the correct charge and this other one isn't.

The Court: Does counsel still press the objection?

20 Mr. Fryling: I have gone beyond the requirements of the procedure to stipulate that the bill was the amount set forth in the bill of particulars. If counsel wants to prove any other amount, I can withdraw that stipulation and I will then require that he prove the amount, and I will then ask the Court to limit it to the amount set forth in the particulars.

30 The Court: Wait a minute. No, there is no need of doing that, because if you are going to insist upon that technical right on the hospital bill, while there was evidently a mistake on the bill, of course it is just too bad for the plaintiff. I will rule on it. I will have to rule, because my ruling will be that he is bound, but I am wondering whether, under all the circumstances, since we all know that higher amount, whether we ought to insist upon it, that is all.

Mr. Fryling: I can't go any further than to agree to the bill of particulars.

40 The Court: You think you will stand on that position? That is all I am thinking about.

*Mary C. Hayes, for Plaintiff—Direct.*

Mr. Fryling: Yes, your Honor.

The Court: Mr. Duffy, I tried to work it out. Have you seen the amount of the so-called other bill, Mr. Fryling? Have you seen the amount?

Mr. Fryling: Yes, I have, your Honor. I don't think that counsel is following the proper procedure in even trying to prove it. 10

The Court: But he has a right to present the question to have me rule on it.

Mr. Fryling: He knows that he is bound by a bill of particulars.

The Court: All right, you take that position.

Mr. Duffy: I know that I am bound by a bill of particulars, but I also know, whether Mr. Fryling from the Public Service stands on his rights in that connection, that I have a right to present to the Court any honest correction in the amount. 20

The Court: Mr. Fryling, I will say this. You will have to—do you press the point? Do you?

Mr. Fryling: I will offer the additional bill of particulars in evidence.

The Court: You will have to put it in evidence first; otherwise, I will overrule the objection. 30

Mr. Fryling: I will offer it now.

The Court: All right, let it go in and be marked, the whole bill of particulars.

(Paper marked Exhibit D-2 in Evidence.)

The Court: Is it all in one, the demand and the answer?

Mr. Fryling: No, here are the questions.

(Paper marked Exhibit D-3 in Evidence.) 40

*Mary C. Hayes, for Plaintiff—Direct.*

The Court: Now put your question and I will rule on it.

10 Mr. Duffy: I just want to point this out to the Court: On February 19, 1941, a letter was directed to the Public Service Electric and Gas Company, and I recite to your Honor for the purpose of pointing out—

The Court: Wait a minute. You don't have to have any letter. I must now decide this question on the bill of particulars, the demand and the answer which are in evidence.

Mr. Duffy: All right.

The Court: I can't go outside of that.

Mr. Duffy: I have no questions presently.

20 By Mr. Duffy:

Q. Miss Hayes, will you examine exhibit P-11 for identification and tell the Court, if you can, how many days James Rizio, Junior, was in the hospital?

Mr. Fryling: I object, if the Court please. This witness doesn't know. These records weren't prepared under her supervision. She doesn't know.

30 By the Court:

Q. Did you prepare these records, Miss Hayes?

A. No, sir.

Q. You are just the custodian? A. Yes. When the patient was discharged I—

The Court: I am afraid I must sustain the objection, Mr. Duffy.

40

*Mary C. Hayes, for Plaintiff—Direct.*

By Mr. Duffy:

Q. What is the name, Miss Hayes, of the person who prepares these bills? A. Well, Mrs. Swords is the cashier.

Q. Mrs. Swords? A. Yes.

Mr. Duffy: I don't think I have the right, Judge Wolber, but would you please request Miss Hayes to direct Mrs. Swords to come here? We subpoenaed the— 10

The Court: Come up here, gentlemen.

(Discussion at side bar.)

Mr. Fryling: All right, I will withdraw my objection and I will stipulate that the hospital bill is—

Mr. Duffy: \$122. 20

The Court: We will need no further questioning on that.

Mr. Duffy: I just want to introduce the hospital bill in the amount of \$122.

Mr. Fryling: I object to the hospital bill going in evidence.

The Court: Sustained. The bill doesn't go in.

Mr. Duffy: Then, Counsel stipulates for the record and for the benefit of the Court and jury that the hospital bill was \$122? 30

The Court: That is right. That is the agreement.

Mr. Duffy: No further questions.

Mr. Fryling: No questions.

(No cross examination.)

*James A. Caspell, for Plaintiff—Recalled—Direct.*

JAMES A. CASPELL, recalled.

*Direct examination (continued) by Mr. Duffy:*

10 Q. Mr. Caspell, on April 10, 1939, you resided in the vicinity of Twentieth Avenue and Dover Street, did you not? A. That is right.

Q. And on April 10, 1939, at around four o'clock in the afternoon were you in the vicinity of Dover Street and Twentieth Avenue? A. That is right.

Q. Did you see James Rizio? A. Yes.

20 Q. Where and under what circumstances? A. James Rizio, the young boy, he was standing on the corner, I call it the corner, of the intersection of Dover Street, between a bungalow—I don't know the address—facing Dover Street. I was coming up on the left-hand side of Twentieth Avenue, going west.

By the Court:

Q. The left-hand side of Twentieth Avenue, going west? A. Yes, sir.

30 Q. All right. A. I seen the boy. He was trying to cross the street, but before he made any attempt to he has looked left and right. I have noticed a truck coming up.

Q. Just a moment. He looked how? You saw him look left and right? A. That is right, sir.

Q. All right, now go ahead. A. Now, then, he have crossed during the time as I was going by, and the only thing I remember that he is being hit by a car, which the car I didn't hear, and I had quite a long ways to see between here—pardon me, Lewis Street and Martin Street.

*James A. Caspell, for Plaintiff—Recalled—  
Direct.*

By Mr. Duffy:

Q. Now, did you see the Rizio boy lying in the roadway? A. Why, yes.

Q. And did you see the car? A. The car? I didn't see the car strike the boy.

Q. Well, after you saw the Rizio boy lying in the roadway did you see the car then? A. That is right. 10

Q. Now, how far, approximately, from where the Rizio boy was lying in the road was the car, in yards or feet? A. Well, we will say about the beginning of the entering of Dover Street I have picked up the boy.

By the Court:

Q. Don't go into that yet. Give us yes or no. A. Oh! 20

By Mr. Duffy:

Q. How many feet, about? A. The distance between?

By the Court:

Q. The distance between where the car stopped and where the boy's body was. A. Twenty-five or thirty feet. 30

By Mr. Duffy:

Q. Now, did you have an opportunity to observe the car in an effort to determine whether any damage was done to it? A. Why, yes, I have seen a dent on the left side of the grille. Is that what you call it in the front of the car?

Q. The grille, part of the radiator, Mr. Caspell? A. That is right. 40

*James A. Caspell, for Plaintiff—Recalled—  
Direct.*

Q. Did you pick up the boy? A. That is right.

Q. Did the driver of the Public Service Electric and Gas Ford automobile get out of his car at any time? A. That I didn't notice.

10 Q. Well, from the time you first saw the boy until you took him away did the Public Service driver come near him? A. No, he didn't.

Mr. Fryling: I object to that, if the Court please. He said he didn't notice.

The Court: What is that?

Mr. Fryling: He said he didn't notice.

The Court: It is just a repetition. He said he didn't notice. He said it twice, didn't he? Go ahead.

20 Q. What, if anything, did you do with the boy?  
A. Well, here is what I done. I have seen the boy get struck by an automobile.

By the Court:

Q. Wait a minute. Did you see this boy struck by the car? A. Yes, sir.

30 Q. A minute ago I thought you said you didn't see the car strike the boy. A. What I mean by that, I didn't notice the boy across that street, but he was there, and I seen the car strike the boy.

Q. You saw this particular car strike this particular boy? A. Yes, sir, that is right, sir.

The Court: All right, go ahead.

By Mr. Duffy:

40 Q. What did you do with the boy after you picked him up? A. Well, I have seen the boy laying in the street. I went over to him and I examined his body. As a matter of fact, I have

*James A. Caspell, for Plaintiff—Recalled—  
Direct.*

asked the Public Service driver if he would come up—

Mr. Fryling: I object to any conversation.

The Court: No, I don't think the conversation is admissible. 10

Q. Did you direct some oral request to the driver of the car? Yes or no. A. Yes.

Q. Did he respond to your request? A. No, sir.

Q. Did you pick the boy up? A. That is right.

Q. What, if anything, did you do with the boy after you picked him up? A. I have taken him to the hospital.

Q. Now, what was the boy's condition? A. This boy's condition, blood coming out of his ear and also hurt on the left-hand side of his head. 20

Q. Was he conscious or unconscious? A. Yes, he was conscious.

Q. He was? A. Yes.

Q. What sort of attire did you have on? A. I had during the time a white shirt, I had the white trousers, and when I picked the boy up my trousers and shirt was full of blood.

Q. You said that you directed some remarks to the driver when you were standing by the boy. Where was the driver when you were addressing him? A. The driver has walked over. I asked him if he would take the boy to the hospital. 30

Q. Go ahead. A. And no one answered. So then by—during that time a car came over and he stopped at the corner. I asked the young lad to take the boy to the hospital. I thought I done my duty to do so. 40

*James A. Caspell, for Plaintiff—Recalled—Cross.*

Q. Now, Mr. Caspell, during that time where where you employed? A. During the time I was a superintendent on WPA.

Q. After this accident did anyone from the Public Service come to you while you were working, for the purpose of obtaining a statement? A. That is right.

Q. Is that person in court? A. I think that gentleman over there, if I am not mistaken (indicating).

Q. Mr. Haffer? A. I believe so.

Q. Did you give him a statement? A. Yes, sir.

Q. Substantially the same as you are telling the Court and jury this morning? A. Exactly. As a matter of fact—may I go ahead?

The Court: No.

Mr. Fryling: I object.

The Court: Is there an objection? No.

Mr. Duffy: That is all. Cross examine.

*Cross examination by Mr. Fryling:*

Q. Were you ever employed by the Public Service Electric and Gas Company? A. Never.

Q. Weren't you fired about fourteen years ago? A. Fired? No, sir.

Q. Now, you were where when this happened? A. What is that?

Q. Where were you when this accident happened? A. I was going up west up Twentieth Avenue.

Q. Coming— A. Going west of Twentieth Avenue, toward Martin Street.

Q. So that you were on the south side of the street? A. That is right.

Q. How far from Dover Street were you when it happened? A. We will say about twenty feet.

*James A. Caspell, for Plaintiff—Recalled—Cross.*

Q. You were with your wife? A. That is right.

Q. Twenty feet from Dover Street? A. That is right.

Q. You were west of Dover Street? A. I was on the left-hand side, going west of Dover Street.

By the Court:

10

Q. Yes, but where were you with relation to Dover Street? East of Dover or west of Dover?

A. Why, that would be north of Dover, where I was coming to the west.

By Mr. Fryling:

Q. Dover Street was in back of you? A. Dover Street was on my side.

20

By the Court:

Q. Had you passed Dover Street? A. I didn't pass Dover Street yet.

Q. Where were you when you saw the accident? A. I was say between Lewis and Dover.

Q. That would be east of Dover? A. That is right. That is right.

By Mr. Fryling:

Q. What do you mean by twenty feet west of Dover Street? A. You asked me how far I was away from the accident, didn't you?

30

Q. You said twenty feet, didn't you? A. That is right. I was twenty feet away before I picked the body up.

Q. Going towards Dover Street? A. I was going toward Martin Street.

Q. You were walking towards Dover Street; is that what you say now? A. I was going towards

40

*James A. Caspell, for Plaintiff—Recalled—Cross.*

Martin, twenty feet before I have hit Dover Street, passing Dover Street.

Q. I see. And you were with your wife? A. That is right.

Q. You saw this boy standing on the sidewalk? A. Exactly.

10 Q. Two of them? A. Just the one.

Q. Just one? A. That is right.

Q. You didn't see Michael Maloney? A. No, I didn't quite remember that or recall.

Q. I beg your pardon? A. I don't remember that.

Q. And the Rizio boy was standing there on the sidewalk; is that correct? A. That is right.

20 Q. Did you see him out in front of this parked automobile? A. I have seen the boy in the front of the parked automobile and he has looked left and right before he crossed.

Q. He had looked left and right before he got in front of the automobile? A. Oh, no, just a moment. He was in the front of an automobile. He looked left and right before he crossed the street, going towards Dover Street. That is an intersection.

Q. And then he started across the street? A. That is right.

30 Q. Did you see the truck pass, too? A. I have seen the truck. The boy waited there. When the truck had passed the boy started up.

Q. Did he look left and right before he started up again? A. Yes, exactly. He did, yes.

Q. Are you sure about that? A. Yes.

Q. Did you hear him say in court yesterday that he did not look then?

Mr. Duffy: Just a moment.

40 The Court: No, don't compare the testimony.

*James A. Caspell, for Plaintiff—Recalled—Cross.*

Mr. Duffy: I object to that.

The Court: Sustain the objection.

Q. He looked both ways, then, after the truck passed, according to you? A. That is right.

Q. And, of course, you don't know what he saw or didn't see? A. Well, now—

10

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

The Court: That is objectionable. It is based on the lack of knowledge.

Q. At any rate, he started to cross the street then? A. That is right.

Q. Running or walking? A. Oh, he was just trotting.

Q. Trotting? A. That is right.

20

Q. And he was hit then by the car? A. That is right.

Q. Wasn't it the right front part of the car that was damaged? A. Well, now, I have seen a dent on that most likely to my knowledge on the left-hand side.

Q. Well, do I take it, then, you aren't very sure about that? A. I am quite sure about that, because I have seen the car.

Q. Would you say you are certain it was on the left front? A. Exactly.

30

Q. And this dent was in the strips of metal that go down on the front of the radiator? A. That is what they call a grille.

Q. That is the fake front, as you might call it, on the modern type of car? A. That is right. That is right.

Q. Now, did you watch this boy from the time he left the sidewalk until he was hit? A. I stuck right with the boy.

40

*James A. Caspell, for Plaintiff—Recalled—Cross.*

Q. Your eyes were right on him? A. That is right.

Q. And you saw each step he took? A. That is right.

10 Q. Did he stop in front of this parked car after he left the sidewalk? A. I have said that three times that the boy looked up and down before he started off.

Q. I didn't ask you that. Did the boy stop in front of the parked car? A. Yes, he did stop. Yes.

Q. So he went from the sidewalk to the street, in the gutter? A. That is right.

Q. And he stopped there and looked both ways? A. That is right.

Q. While the truck was passing or after the truck had passed? A. Exactly.

20 Q. And then trotted out in front of this car? A. That is right.

Q. Do you know where the car was when the boy stepped out? A. Yes. The car was in front of the bungalow, we will say about ten feet back from before hitting the bungalow.

Q. Before the parked car? A. That is right.

30 Q. When the boy trotted out? A. No. You asked me where the car was parked. The car was parked between the empty lot and the bungalow. It was ten feet from the bungalow, coming this way (indicating).

Q. All right. Now, listen to the next question. When the boy stepped out from behind the parked automobile did you see the automobile that struck him? A. No, I didn't see the automobile.

40 Q. Your eyes were on the boy? A. I didn't see the automobile, but I have seen when the boy crossed, before the crossing, looking up and down, left and right. Then he crossed, but the automobile I didn't see coming.

*James A. Caspell, for Plaintiff—Recalled—Cross.*

Q. He trotted out in front and was hit? A. That is right.

Q. That is the first time you saw the automobile? A. That is right, yes.

Q. You are quite sure that you were looking when this boy was actually hit? A. Exactly.

Q. Now, you mentioned Mr. Haffer. When did you see him? A. I believe Mr. Haffer was about a week—I don't remember. Quite a few days or a week that he came up and he saw me. Is that right, Mr. Haffer? 10

The Court: Wait. You are not supposed to ask questions; you are to answer them.

The Witness: I am sorry. I am sorry.

Q. Did he ask you about the accident? A. That is right. 20

Q. And you told him about it? A. Yes, I did.

Q. You told him the truth, as far as you saw it? A. Exactly, that is right.

Q. And your memory that soon after the accident was quite clear, wasn't it? A. That is right.

Q. You did tell him the truth? A. I did, yes.

Q. You had no reason to lie, anyway? A. No reason at all, no.

Q. And as you told him about the accident did he write it out? A. Exactly. 30

Q. In a written document? A. He wrote it out, yes.

Q. Did you read it over? A. I didn't read it. I didn't read what I have told him, but exactly just how the accident I told him that. I says, "That accident happened that way," and that was all there was to it.

Q. And he wrote it out? A. Yes.

Q. Did you sign that paper? A. I don't quite remember if I did or not. 40

*James A. Caspell, for Plaintiff—Recalled—Cross.*

Q. You don't remember that? A. No. I don't remember if I did or not, no.

Q. On the bottom of this top page——

Mr. Duffy: I object to any exposition of that until it is marked, if the Court please, for identification.

10

The Court: It should be marked for identification. It hasn't been identified yet. He has to first identify it.

Q. On the bottom of that page, that top page, is that your signature? On the bottom. A. Oh, the bottom?

Q. The bottom of the top page, is that your signature? A. Now, just a minute. I can take a look at this, can't I?

20

By the Court:

Q. At the signature. That is all you look at for the moment. Just look at the signature. Is that yours or isn't it? A. Yes, I believe it is.

Mr. Duffy: There is no objection on the part of the witness examining it, is there?

Q. Is that your signature on the second page?  
A. That is right.

30

The Court: He is asked to identify a signature.

Mr. Duffy: Yes.

Q. Is that your signature on the third page?  
A. That is right.

Q. And these two lines above your signature, is that in your writing? A. That is right.

Q. What does it say? A. "I have read the above statement and found it is truth and correct." It is correct, what I have told him.

40

*James A. Caspell, for Plaintiff—Recalled—Cross.*

Q. That is in your handwriting? A. That is right.

Mr. Fryling: I ask that these three pages be marked for identification.

(Papers marked D-4 for Identification.)

Mr. Duffy: Do you have any objection if I look at them? 10

Mr. Fryling: Yes, I have, Mr. Duffy.

Q. Now, that is the paper you signed for Mr. Haffer, isn't it? A. That is right.

Q. These are the papers, rather, that you signed for Mr. Haffer? A. That is right.

Q. And you say that was a week or so after this accident? A. I believe so. It is almost two years or more past. 20

Q. Well, now, can you tell us whether or not you read this over before you signed it? A. I didn't. I didn't read that. I told him just exactly how the accident happened.

Q. So this last line that you read to the jury is false? A. Why?

Q. Didn't you write down here, "I have read the above statement and find it true and correct"? A. That is what I have told Mr. Haffer, whatever the gentleman's name is. I couldn't lose time. In order to leave me alone, return on the job,—— 30

Q. Do you want to look at those two lines again? A. I read them for you, didn't I?

Q. Read them out loud.

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

The Court: Why? This is cross examination.

Mr. Duffy: He told him to read it out loud. 40

*James A. Caspell, for Plaintiff—Recalled—Cross.*

The Court: Only that portion.

Mr. Duffy: I think the form of the question is objectionable, "Read them out loud." I think Mr. Fryling can very properly say, "Will you read the last two lines?"

10

The Court: I sustain the objection.

Q. Will you read them out loud? A. "I have read the above statement and found it truth and correct." Right?

Q. Now, are those lines correct? A. I think so. The statement that I gave Mr. Haffer there according to the accident, yes.

20

Q. Is it correct where you say that you have read? A. Exactly, just as correct as I gave him the statement. That is how the accident happened, and I gave it to him, and I signed it upon that.

Q. I am not asking you about that, Mr. Caspell. A. You are asking me a question and I am telling you.

Q. You wrote down here, "I have read the above"? A. That is right.

Q. Is that true or is that not true? A. Yes, it is true.

30

Q. So you did read this? A. I didn't read that, but it is the truth that I signed as correct what I told that gentleman there about the accident.

Q. I am only asking you is it true what you wrote? A. I am only answering you.

Q. "I have read the above." Is that a correct statement or is it not? A. Pardon me, your Honor. Can I have them papers a minute?

40

Mr. Duffy: No, you aren't supposed to look at them, Mr. Caspell.

The Witness: I just want to explain it, Mr. Duffy.

*James A. Caspell, for Plaintiff—Recalled—Cross.*

Q. Mr. Caspell, I am not talking about what is on these three pages; I am talking about that one little sentence that you wrote. A. That is right. I am telling you it is correct. It is correct what I had told Mr. Haffer.

By the Court:

10

Q. Wait a minute, Mr. Caspell. Did you or did you not read what he wrote down? A. I told him that.

Q. Did you read it or didn't you? A. No, sir.

Q. And yet you wrote that statement down, that you did read it? Now, which is it? A. I didn't read it. I tell you the truth, I didn't read it.

Q. You didn't read it. All right, take the witness. A. No, sir, that—

20

Q. No explanation. You answer the questions, sir. A. All right.

By Mr. Fryling:

Q. Did Mr. Haffer ask you how old you were? A. I don't think so, no.

Q. So you didn't tell him? A. No.

Q. Did he ask you where you worked? A. That is right.

Q. And you told him? A. Yes.

30

Q. What did you tell him? A. North Jersey Training School.

Q. Did he ask you whom you were employed by? A. Yes.

Q. What did you tell him? A. United States Government, WPA.

Q. Did he ask you what nationality you were? A. I think he did, yes.

Q. What did you tell him? A. Italian descent.

Q. What? A. Italian descent.

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*James A. Caspell, for Plaintiff—Recalled—Cross.*

Q. Did he ask you where you were born? A. That is right.

Q. What did you tell him? A. United States. Paterson, New Jersey.

Q. What time was this?

10

Mr. Duffy: What time? When he was born?

Mr. Fryling: No. What time was the conversation?

The Court: He wouldn't know that. We take that from hearsay.

Q. Can you tell me what time this conversation took place? A. Well, we will say about three-thirty, four o'clock.

20

Q. Around three-thirty or four o'clock? A. About that.

Q. It wasn't twelve o'clock noon, was it? A. No, I don't think so.

Q. And where was this? A. Oh, pardon me. I believe so, yes.

Q. It was twelve o'clock noon? A. Yes.

Q. Was it on April 24, 1939? A. I believe so, yes.

Q. And at the North Jersey Training School? A. Yes.

30

Q. Now, did you tell Mr. Haffer that on Monday, April 10, 1939, at about 4:05 P. M. you were walking on the south side of Twentieth Avenue, Paterson, New Jersey; my wife was walking with me; the weather was clear and the pavement dry? A. That I didn't tell that gentleman.

Q. You didn't tell him that? A. No, sir.

By the Court:

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Q. You didn't tell him that? A. Absolutely, your Honor.

*James A. Caspell, for Plaintiff—Recalled—Cross.*

By Mr. Fryling:

Q. But you were walking on the south side of Twentieth Avenue with your wife and the pavement was dry and the weather was clear? A. That is right.

Q. So whether you told him that or not, it is true? A. Well, that I don't remember, as far as that is concerned. 10

Q. You don't remember telling him that? A. No.

Q. But it is still true, isn't it? A. The road was not wet.

Q. Mr. Caspell, will you just answer the question? I asked you, Was it true that on Monday, April 10, 1939, about 4:05 P. M. you were walking on the south side— A. That is right. 20

Q. (Continuing)—of Twentieth Avenue— A. That is right.

Q. (Continuing)—with your wife; that the weather was clear and the pavement dry? A. That is right.

Q. I asked whether or not you told him that.

The Court: Whether you told him that.

A. That is right.

The Court: Just a moment. When he asks you that he means whether you told Mr. Haffer that. 30

The Witness: I understand, your Honor.

The Court: Do you understand that?

The Witness: Yes.

Q. So that is true, whether you told him or not? A. Yes, it is true.

Q. Did you also say this: "As we walked along in a westerly direction talking, and when about 40

*James A. Caspell, for Plaintiff—Recalled—Cross.*

seventy-five feet east of Dover Street, my attention was attracted by a sound of something being hit''? A. I never said that.

Q. You never said that? A. No, sir, I never.

10 Q. Did you say to Mr. Haffer at the same time and place: "I looked forward and noticed a small child rolling on the pavement''? A. Exactly. Yes, I remember that.

Q. Did you say that? A. Yes.

Q. The sentence before you didn't say? A. No, sir.

Q. Did you say: "This child was about twelve to fifteen feet west of Dover Street''? A. No.

Q. Did you say that he was about twelve or fifteen feet west of Dover Street when you first noticed him? A. I did not, no.

20 Q. That he was rolling in front of an automobile and was about ten feet out from the south curb of Twentieth Avenue? A. Yes, I did. Yes.

Q. You did say that? A. Yes.

Q. Ten feet out from the south curb of Twentieth Avenue? A. South curb of Twentieth Avenue?

Q. I will repeat the whole question. A. Please do that.

30 Q. That the child was rolling in front of an auto and was about ten feet out from the south curb of Twentieth Avenue, and the child rolled to about twenty to twenty-five feet east of the west curb-line of Dover Street? Did you say that? A. Yes, he did roll. The boy did roll.

Q. Did you say that? A. Yes, I did. Yes.

Q. Did you also say: "I ran to the child, the first one to reach him''? A. That is right.

Q. That is true, too? A. Yes.

40 Q. "He laid in a crouched position on his right side''? A. That is right.

*James A. Caspell, for Plaintiff—Recalled—Cross.*

Q. "Facing Dover Street and about ten feet out from south curb of Twentieth Avenue"? A. I didn't tell him that.

Q. Did you say that? A. No, I didn't tell him about how he was facing.

Q. You didn't tell him that? A. I didn't say about ten feet or anything of that sort. 10

Q. Did you tell him, "The auto which the boy had come into contact with was stopped about twenty feet west of where the boy laid, or the front end of auto about on an even line with west curb-line of Dover Street"? A. That is right.

Q. You did say that? A. Yes.

Q. And that was true? A. That is right.

Q. Did you say, "There was another auto at south curb facing east on Twentieth Avenue and east of Dover Street"? A. That is right. 20

The Court: Does that say facing—

Mr. Duffy: East now. It has been west and east and now it is west again.

The Court: It is east in the statement, the south curb facing east on Twentieth Avenue.

Mr. Fryling: And east of Dover Street.

By the Court:

Q. You said that? A. Yes, sir. 30

By Mr. Fryling:

Q. "And which auto blocked my view of the contact or accident." Did you say that? A. I never said that.

Q. You never said that? A. No, sir.

Q. Did you say, "I picked the boy up, and after examination of the boy I felt he had no broken bones, but as he was bleeding in back of his 40

*James A. Caspell, for Plaintiff—Recalled—Cross.*

head—” A. I didn’t tell him anything of that sort.

Q. You didn’t tell him that? A. No.

Q. That he should get medical attention? A. That is right.

Q. You did say that? A. I said that, yes.

10 Q. Did you say, “So an auto passing was stopped and I carried the boy into this auto, and another WPA man from near-by field office went with me”— A. That is right.

Q. (Continuing) “—in the auto”? A. That is right.

Q. “And we took the child to the General Hospital where we left the child in care of the hospital physician and nurse”? A. That is right.

Q. You said that? A. Yes.

20 Q. Did you also say: “I do not know anyone who saw this accident outside of the man from the WPA field office”? A. That is right.

Q. By the way, that was the man who testified the other day, Mr. Mornick? A. It was Tuesday sometime, yes.

30 Q. Did you also say to Mr. Haffer: “Due to auto parked on the south side of Twentieth Avenue, facing east, with its front end close to the center line of Dover Street, it blocked both my view and my wife’s view and prevented us from seeing how this accident happened or where the child came from or was going to”? Did you say that? A. That was never said.

Q. You didn’t tell him that? A. No, sir.

Q. Did you say, “We were the only ones on this side of the street; the child was alone and no other children around”? A. That is right.

Q. You did say that? A. Yes.

40 Q. You were acquainted with this boy’s family before this accident? A. Well, I have known his father about twenty years.

*James A. Caspell, for Plaintiff—Recalled—Cross.*

Q. Didn't you tell Mr. Haffer that about fourteen years before this conversation took place you worked for the Public Service Electric and Gas Company? A. I never said anything of that sort, no.

Q. That you never worked for the Public Service Electric and Gas Company? A. No, I didn't. No. 10

Q. You never did? A. No.

Q. Did you say that you worked for that company at Ridgewood, New Jersey, for the gas department? A. No.

Q. Did you ever work for the gas department at Ridgewood? A. No. I have tried to get a job from them.

Q. I beg your pardon? A. I have tried, but never worked for them. 20

Q. Did you tell Mr. Haffer that you had a fight with the foreman and that you were discharged? A. No, sir.

Q. Did you tell Mr. Haffer that Mr. John Benson, superintendent of the gas department, had refused to give your job back to you?

Mr. Duffy: Just a moment. I object to this.

The Court: Why? This is preliminary to affecting the witness's credibility, asking him whether he made a certain statement to somebody. 30

Mr. Duffy: No objection if that is the purpose of it and there will be some sort of categorical denial.

The Court: That is all it can be.

(The last question was read by the reporter.)

A. No, I didn't. 40

*William Winterberg, for Plaintiff—Direct.*

Q. Did you ever see Mr. John Benson? A. No, sir; never seen him.

Q. To ask him for a job or anything else? A. No, sir; never.

Q. Is your wife in court? A. No, sir.

10

The Court: Anything else?

Q. Was she present when you signed these documents? A. I beg your pardon?

Q. Was she present when you signed these papers? A. No.

Q. Do you know whether she signed one, too?

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

The Court: Objection sustained.

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A. Absolutely not.

The Court: It is not proper cross examination.

Mr. Fryling: That is all.

Mr. Duffy: No further questions.

(At this point a brief recess was taken.)

30

WILLIAM WINTERBERG, called.

By the Court:

Q. How old are you, Billy? A. Fourteen.

Q. Do you know why you are being called to come up here? A. Yes.

Q. What do you understand it to be? A. To testify.

40

Q. To testify. Do you know what it means to testify? A. To tell all you know about it.

*William Winterberg, for Plaintiff—Direct.*

Q. To tell all you know about it? A. The truth.

Q. Do you know what it means to put your hand on the Holy Bible? A. Yes.

Q. What? What do you understand it to mean?

A. If you don't tell the truth you won't go to Heaven.

Q. You think if you don't tell the truth what will happen to you? A. You won't go to Heaven. 10

Q. What class are you in in school? A. 7-A.

The Court: I think this youngster understands the sanctity of an oath.

(The witness was thereupon duly sworn.)

*Direct examination by Mr. Duffy:*

Q. Billy, where do you live? A. 293 West Third Street. 20

Q. Where is that located? A. Clifton, New Jersey.

Q. Do you go to school? A. Yes.

Q. What school? A. School Number 1.

Q. Where do you live now? A. 296 West Third Street.

Q. And where did you live on April 10, 1939? A. 240 Twentieth Avenue.

Q. Do you know Jimmy Rizio? A. Yes.

Q. Is he a friend of yours? A. Yes. 30

Q. Do you remember the day when there was an accident in which he was involved? A. Yes.

Q. Did you go to the scene of the accident? A. Yes.

Q. Did you notice anything on the pavement, extending from the rear wheels of the car? A. Yes.

Q. Back for some distance? A. Yes.

Q. What did you see? A. There were skid-marks. 40

*William Winterberg, for Plaintiff—Cross.*

*Lena Maloney, for Plaintiff—Direct.*

Q. Well, now, could you tell me how many feet, Billy, they were, about? A. They were about ten feet.

10 Q. And they were from where to where? They started where? A. From the front of the car where he was hit to the back of the—about to the back of the parked car.

Mr. Duffy: Cross examine.

*Cross examination by Mr. Fryling:*

Q. When did you see these skidmarks, Billy? A. It was after the accident.

Q. Right afterwards? A. Yes.

20 Q. And you say that the marks were from the front of the automobile— A. That hit him.

Q. (Continuing)— that hit Jimmy— A. Yes.

Q. (Continuing)— to the back of the automobile that was parked? A. To the front of the automobile that was parked.

Q. To where the parked car was? A. Yes.

Q. You didn't see this accident? A. No.

Mr. Fryling: I think that is all.

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LENA MALONEY, SWORN.

*Direct examination by Mr. Duffy:*

Q. Mrs. Maloney, you are the mother of Michael Maloney; is that correct? A. Yes.

Q. Do you remember about a year and a half ago a man coming to your house for the purpose of taking a statement? A. Yes.

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*Motion for Non-suit.*

Q. Do you recognize Mr. Busch, the man with the grey hair and partially bald and the glasses, as being that person? A. I couldn't remember.

By the Court:

Q. Do you? Do you remember him? A. I couldn't place him.

10

By Mr. Duffy:

Q. Did he request that you call your boy in?

Mr. Fryling: If the Court please, I don't think this is proper proof on the plaintiffs' case.

The Court: What are you going to prove by this?

Mr. Duffy: The circumstances under which the statement was taken.

20

The Court: The statement is not in evidence yet.

Mr. Duffy: All right, I will withdraw Mrs. Maloney.

The Court: It may never come in. I don't know.

(Discussion relating to the production of a plaintiffs' doctor not here transcribed.)

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(THE PLAINTIFFS RESTED.)

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MOTION FOR NON-SUIT.

Mr. Fryling: I respectfully move for a non-suit at this juncture on the ground that the proofs as they are now before the Court do not show that the defendant, through its servant, was guilty of any negligence which

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*John K. Russell, for Defendant—Direct.*

was the proximate cause of the accident and the injuries complained of;

10 On the second ground, your Honor, that the proofs as adduced by the plaintiff show that this accident resulted from the contributory negligence of the plaintiff himself, that is, the infant plaintiff, James Rizio.

(Discussion.)

The Court: The motion is denied.

Mr. Fryling: May I have an exception?

The Court: You may have an exception.

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DEFENDANT'S CASE.

JOHN K. RUSSELL, SWORN.

*Direct examination by Mr. Fryling:*

Q. Mr. Russell, you are employed by the Public Service Electric and Gas Company? A. Yes, sir.

Q. And you were employed by that company on April 10, 1939? A. Yes, sir.

30 Q. Were you driving a car on that day? A. Yes, sir.

Q. A car owned by that company, your employer? A. Yes, sir.

Q. What kind of work do you do? A. I am an engineering assistant.

Q. Did you use your car in connection with your work, or the company car in connection with that work? A. Yes, sir.

40 Q. What kind of a car was that? A. A Ford coupe.

*John K. Russell, for Defendant—Direct.*

Q. Do you know what year it was? A. 1935, I believe.

Q. In what condition was it? A. It was in first-class condition.

Q. How were the brakes? A. The brakes were all right.

Q. Do you remember what the weather was on April 10, 1939? A. It was clear. 10

Q. This was during the afternoon? A. During the afternoon.

Q. How were the streets? A. The streets were dry.

Q. How was your windshield? A. The windshield was clean.

Q. Now, were you traveling east on Twentieth Avenue in Paterson? A. Yes.

Q. During that afternoon at approximately four o'clock? A. Approximately four o'clock. 20

Q. Now, as you came down Twentieth Avenue, confining yourself to the block between Martin Street and Lewis Street, will you tell the ladies and gentlemen of the jury and the Court what you saw and what happened and what you did, everything you know about this accident? A. As I was proceeding down Twentieth Avenue, going east, at a moderate rate of speed, when I crossed Martin Street, looking ahead I observed parked cars on my right. I also observed children on the sidewalk. I proceeded on down the street, and when I came to one of these parked cars a boy darted out from the sidewalk in front of the car. I immediately applied my brakes and swerved to the left. The boy—the right front bumper struck the boy's leg, throwing him—or the right front side of the automobile, the right front grille work of the automobile. The boy fell to the pavement, and when he hit the grille work his head hit the 30 40

*John K. Russell, for Defendant—Direct.*

10 top of the radiator and he fell to the pavement and rolled over. I immediately got out of the car and went to him, and I noticed a couple of people running up and I asked them to call up for an ambulance to come. At that time another car coming west stopped and two men picked the boy up and put him in an automobile and took him to the hospital. I immediately got in my car and followed that car to the hospital. I pulled into the yard right behind it and went in the hospital with the boy. The boy was admitted into the hospital. The doctor examined him. The nurse took down all the necessary information and they requested me to stay there until the detectives came. I stayed there—

20 Q. Let me interrupt you just a moment, please, Mr. Russell. Going back to when you were proceeding down Twentieth Avenue, you said a moderate rate of speed. What do you mean by that? A. I was traveling approximately between twenty and twenty-five miles an hour.

Q. And how far from the parked cars were you traveling? A. Well, I should judge that there was a distance of possibly three feet between my right fender and the parked car's left fender.

30 Q. Now, where were you or where was your car when you observed the children playing on the sidewalk? A. I had just crossed the intersection of Martin Street, and as I looked ahead I observed these children on the sidewalk.

Q. Can you tell me how far back that was? A. I would say approximately—

Mr. Duffy: From where, Mr. Fryling.

Mr. Fryling: From Martin Street to where those children were.

40 A. Approximately 185 feet.

*John K. Russell, for Defendant—Direct.*

Q. And what were they doing? A. They just seemed to be moving around on the sidewalk there.

Q. Did any one of those children at any time, so far as you could see, move towards the curb or street? A. Not that I noticed at that time.

Q. Where was your car when you first saw anyone in the street? A. The front of my car was about even with the rear of the parked car at the curb. 10

Q. And where was the child that you saw in the street at that time? A. He was running from in front of this parked car approximately ten feet ahead of my car.

Q. Can you describe his motion or his pace, whether he was going slowly or fast or whether he was walking or running or what he was doing? A. Well, he was running. 20

Q. Can you give us some description of how he was running? A. Just like he was just tearing across the street.

Q. Do you know in what direction he was running? A. Directly across the street.

Q. When did you apply your brake? A. As soon as I seen him I stepped on my brake right away and swerved to the left to avoid hitting the boy. 30

Q. How far to the left did you get before your car stopped? A. The right side of my car was approximately twenty feet from the south curb of Twentieth Avenue when I stopped.

Q. Would that be in about the middle of the road? A. Approximately the middle of the road.

Q. Now, can you tell us this: Where was that car parked, from behind which this boy ran, with respect to Dover Street? A. It was parked somewhere near the intersection of Dover Street. I 40

*John K. Russell, for Defendant—Direct.*

couldn't tell you the exact amount of feet or even the approximate amount of feet.

Q. What was the condition of Dover Street that day? A. The condition of Dover Street?

Q. Yes. A. It was open for traffic. It had been closed up.

10 Q. It had been closed? A. Yes, sir.

Q. Was it under repair or anything that day? A. No, sir.

Q. Can you estimate the distance that your car moved after you applied your brakes? A. I would say approximately twelve or fifteen feet.

Q. Can you estimate how far it moved from the time it hit this boy? A. I would say about a foot, that is all.

20 Q. Can you say how fast your car was going at the time of the impact? A. That I couldn't say.

Q. Had this boy made any attempt to stop from the time you first saw him until your car collided with him? A. No, sir.

Q. What did you do after your car stopped? A. I immediately got out of the car and went to the boy.

30 Q. Was anyone else there? A. I noticed two men come running up. Where they came from I don't know.

Q. Did you do anything? A. I went to the boy and I requested somebody to call for an ambulance.

Q. Did you endeavor to pick him up? A. No, sir.

Q. Why not? A. Well, I have been instructed in first-aid that when a person is injured to leave them lay there, on account of broken bones, and to get a doctor as quickly as possible.

40 Q. Did anyone else pick this boy up? A. Yes.

*John K. Russell, for Defendant—Direct.*

Q. Did you say anything about that? A. No, sir. They picked him up and put him in the car and went right to the hospital.

Q. And you followed; is that it? A. I followed him up to the hospital.

Q. How wide would you say Twentieth Avenue was there? A. I would say forty feet, or possibly more. 10

Q. And can you tell me how far it was from the front of your car after your car stopped to where the boy was hit? A. Approximately eight feet.

Q. Did you see him roll that distance? A. I seen him when he hit the front of the car, and he fell forward and seemed to roll over just about once.

Q. Did any part of your car roll over him? A. No, sir. 20

Q. You say this was the right front part of your car? A. Yes, sir.

Q. Are you certain about that? A. I am positive.

Q. Was there any mark on your car afterward? A. There was a dent in the right front part of the grille work where his shoulder hit.

Q. Were you able to get any names of people who had observed the accident?

Mr. Duffy: I object to that, if your Honor please. 30

The Court: What difference does it make?

Mr. Fryling: I will withdraw it.

The Court: Any other questions?

Mr. Fryling: That is all.

(A recess was taken until two o'clock p. m.) 40

*John K. Russell, for Defendant—Direct.*

AFTERNOON SESSION, 2 P. M.

JOHN K. RUSSELL, resumed.

Mr. Fryling: If your Honor please, I would like to ask this witness one further question on direct examination.

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*Direct examination (continued) by Mr. Fryling:*

Q. Mr. Russell, I show you two pictures. Will you look at them and tell us whether or not they correctly show the condition of the front of the car which you were driving at the time of the accident? A. Yes, sir, they do.

Q. As it appeared immediately after the accident? A. Yes, sir, they do.

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Q. You referred this morning to a dent or a place on the radiator grille that was pushed in. Does that appear on these pictures? A. Yes, sir, it does.

Mr. Fryling: I offer these pictures in evidence.

Mr. Duffy: May I ask this witness some questions, Judge?

By Mr. Duffy:

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Q. Do you know who took these pictures, Mr. Witness? A. No, sir, I do not.

Q. How long after were they taken? Do you know that? A. No, sir, I do not.

Mr. Duffy: I object to them.

The Court: The objection is overruled. Have you got any reason? In other words, he identified them as the portrayal of the condition of the automobile immediately after the accident.

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*John K. Russell, for Defendant—Direct.*

Q. Well, Mr. Russell, when did you look at your car after the accident? A. As soon as I came out of the hospital.

Q. Where was it parked? A. The car at that time was parked in the yard of the hospital.

Q. You don't know who took them? A. No, sir, I do not.

Q. And you don't know when they were taken? A. No, sir, I do not.

Mr. Duffy: I object to them, if the Court please.

The Court: Now the witness says he didn't see it until after he came out of the hospital and there is no evidence given as to when he saw the car, except after he got out of the hospital. I don't know when that was.

By Mr. Fryling:

Q. How soon after the accident was it when you came out of the hospital and saw your car? A. I would say approximately three-quarters of an hour.

Q. In the meantime, if you know, had any repairs or changes been made to the front of that car? A. No, sir.

Q. Had you run into anything else? A. No, sir.

The Court: Do you still press your objection, Mr. Duffy?

Mr. Duffy: Yes, sir.

The Court: Overruled.

(Photographs marked Exhibits D-5 and D-6 in Evidence.)

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*John K. Russell, for Defendant—Cross.*

Q. Now, Mr. Russell, can you tell us whether or not anyone else besides yourself ever drove this particular automobile? A. Yes, sir.

10 Q. Do you know how many other people? A. Well, these cars, we sign out for them in the morning, and I might possibly get that car today and tomorrow I will have another car. Maybe two or three other persons drive a single car in a day.

Q. I call your attention to the picture marked D-6, to the left front fender. That shows signs, apparently, of having been repaired before these pictures were taken. Can you tell us whether or not that condition in any way resulted from or was caused by this particular accident? A. No, sir, it was not.

20 Q. Do you know anything about that left front fender? A. I know that that left front fender was like that for at least a year previous to this accident.

Mr. Fryling: Cross examine.

*Cross examination by Mr. Duffy:*

Q. Mr. Russell, how long have you worked for the Public Service? A. Twenty years.

30 Q. And on April 10, 1939, what was your particular position? A. Engineering assistant.

Q. How long had you been employed as an engineering assistant? A. Approximately ten years.

Q. Before that what was your position? A. I worked in the line department, as clerk in the line department.

40 Q. Before you worked in the line department where were you employed? A. Okonite Company, in Passaic.

*John K. Russell, for Defendant—Cross.*

Q. Now, Mr. Russell, looking at exhibit D-6 and pointing at the grille, would you say that there was any indentation in that grille where it comes to a point in the front?

Mr. Fryling: Oh, if your Honor please, I object. I think the pictures speak for themselves.

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The Court: His opinion wouldn't help us much, would it, Mr. Duffy? Won't the pictures speak for themselves, and won't the jury, when they look at them, make whatever inference they feel justified in making, no matter what he says, no matter what his opinion is?

Mr. Duffy: I still feel that I am properly within my rights to ask him if by looking at the pictures he can observe certain conditions on them.

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The Court: I think he may do that, because this witness has testified previously that there was a dent on the right grille or the right-hand side of the grille of the radiator, aside from the pictures. Then he also identified this picture as a reproduction of the car which he was driving, after the accident. Isn't that so?

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Mr. Fryling: Yes, and he is asked as to his opinion as to what the picture shows.

Mr. Duffy: I am not asking any opinion.

The Court: Why can't his attention be called to the picture? Not for an opinion; I think that is objectionable. But why can't he be asked to point out on the picture where the dent was?

Mr. Fryling: As I recall it, I don't think that was the question.

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*John K. Russell, for Defendant—Cross.*

(The last question was read by the reporter.)

The Court: I sustain the objection. It is an opinion. His opinion is being asked, by the form of that question.

10 Q. By looking at the picture, D-6, would you say the front portion of the grille was dented in or not, Mr. Russell?

Mr. Fryling: I object.

The Court: You haven't cured it yet, Mr. Duffy. I must sustain the objection.

Q. Does there appear on this picture, D-6, an indentation where the grill converges at the front?

20 Mr. Fryling: I object. It is the same question.

The Court: Overruled. Now he is asked to point out substantially where the dent is that he testified to.

Mr. Fryling: May I have an exception?

The Court: I shall overrule the objection and allow you an exception.

A. Will you repeat the question?

30 (The question was read by the reporter.)

A. No, sir, I wouldn't say there does.

Q. Mr. Russell, before the accident were these rods that appear on exhibit D-5 flush with the outer surface of the grille? A. Yes, sir.

Q. After the accident were they? A. No, sir.

40 Q. Pointing to the position on this picture where the grille and that top and second and third and fourth steel rods are shown, is there some

*John K. Russell, for Defendant—Cross.*

space between the front part of it and the grille?  
 A. There would be some space between the front part of it and the grille.

Q. Was there after the accident? A. Yes, sir.

Q. And does it appear on this picture at the front part of the grille, where your pinkey is?

Mr. Fryling: If the Court please, I object to that. 10

The Court: I sustain the objection to that question. He is now asked to interpret a picture, which will speak for itself.

Q. Mr. Russell, did you tell Mr. Fryling that while you were in the hospital some detectives came there? A. Yes, sir.

Q. Did they come? A. Yes, sir.

Q. And did they speak to you? A. Yes, sir. 20

Q. And did you recite to them anything in connection with the accident? A. Yes, sir.

Q. Do you remember who the detectives were? A. No, sir, I do not.

Q. Do you recognize these two gentlemen in the front seat, Detective Hermann and Brooks, of the Paterson Police Department? A. I sort of dimly recognize them, yes.

Q. Were they the men with whom you spoke? A. If they were the men that came to the hospital, they were the men to whom I spoke. 30

Q. Do you remember telling those two men that the damage was to the left front of the grille of the automobile? A. No, sir.

Mr. Fryling: If the Court please, at this point I object to such questions, unless the jury is instructed that these questions go to credibility. 40

*John K. Russell, for Defendant—Cross.*

10 The Court: They only would. They only would go to credibility, because it would not be binding, as nothing has been shown to indicate that he had any authority to bind the company by any declarations that were made after the accident. It will be admitted for the purpose, if such is the case, of affecting his credibility.

Mr. Duffy: Precisely, sir.

Q. Do I understand there were two contacts, Mr. Russell, the right front bumper and the right front grille, between the boy and the car? A. The right front bumper hit the boy's leg, which threw him into the grille work.

Q. Propelled him back? A. Yes, sir.

20 Q. This was during the Easter holidays, was it not? A. I think it was.

Q. Well, if I remember correctly, you said that on direct examination, did you not? A. No, sir, I did not.

Mr. Fryling: I object. He didn't say that.

The Court: I don't think he mentioned the holiday.

30 Mr. Fryling: The plaintiff testified about that holiday in answer to my question.

The Court: Somebody said it, but I am pretty sure this witness didn't.

Q. Well, do you know now, as a matter of fact, whether or not it was during the Easter school holidays, Mr. Russell? A. I think it was.

40 Q. Now, you testified that as you were going east on Twentieth Avenue your right front fender was about three feet from the left front fender of the parked cars? A. Yes, sir.

*John K. Russell, for Defendant—Cross.*

Q. Is that correct? A. Yes, sir.

Q. Where would that put your left front wheel or left front fender with reference to the center of the road, if you remember? A. The left front fender? It would be approximately twelve or fifteen feet out from the curb.

Q. Would it be south of or north of the imaginary center line of Twentieth Avenue? A. It would be south of the imaginary center line. 10

Q. It would be south. That would be on your side of the street; is that correct? A. Yes, sir.

Q. How many cars were there parked on the right side between Lewis and Dover Street if it was extended across Twentieth Avenue? A. Between Lewis Street and Dover Street?

Q. Or Martin Street, rather. I am sorry. A. My recollection is there was two. 20

Q. Two? A. Yes, sir.

Q. Now, this car in front of which the boy went, walked, trotted, or ran, was that pointing east or pointing west? A. That I could not say.

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

Q. Now, you say there was another car to the west of that? A. Yes, sir.

Q. How far in back of it, if you remember, Mr. Russell? A. I couldn't tell the exact distance. I noticed these cars parked there, but as for distances, I didn't take any notice of that. 30

Q. When did you first see the boys on the sidewalk, Mr. Russell? A. When I crossed Martin Street.

Q. And you had a clear view for how long? A. I would say for a distance of approximately maybe 150 feet.

Q. How many boys do you remember seeing? A. Offhand I would say possibly two or three. 40

*John K. Russell, for Defendant—Cross.*

- Q. They were on the sidewalk? A. Yes, sir; they were on the sidewalk.
- Q. Were they closer to Martin Street or closer to Lewis Street or to Dover Street? A. They were closer to Dover Street.
- Q. Closer to Dover Street? A. Yes, sir.
- 10 Q. Now, as you came along, did the two cars obscure your view of the sidewalk? A. Yes, sir; they did.
- Q. And by the same token, did they obscure your view of those boys? A. Yes, sir.
- Q. So that for a distance of how long didn't you see the boys, about? A. I would say approximately twenty-five or thirty feet.
- Q. Mr. Russell, did you notice a truck pass you going in the opposite direction? A. No, I did not.
- 20 Q. You did not? A. No, sir.
- Q. Were you looking ahead? A. Yes, sir.
- Q. From the time you crossed the intersection of Martin Street and were going east? A. Yes, sir.
- Q. And you didn't see any truck at all pass you? A. None that I noticed.
- Q. Would you say that there wasn't, Mr. Russell? A. I wouldn't say positive that there wasn't.
- 30 Q. But you can't remember having seen it? A. I don't recall seeing any truck on that block.
- Q. How far in front or in back of the parked car which was nearest Lewis Street was the boy when you first saw him? A. That I couldn't say.
- Q. About how far? A. I wouldn't even venture a guess on it, because I couldn't.
- Q. Well, you were riding along, going east, and then there appeared in your vision a boy? A. Yes, sir.
- 40

*John K. Russell, for Defendant—Cross.*

Q. Were you right abreast of that first car, the easternmost car? A. No, sir.

Q. Where were you? Back of it? A. I was in back of it.

Q. And was the boy in the road? A. The boy was running across the street.

Q. You said you were in back of the car? A. I was west of the car. 10

Q. About how far? A. I would say a car's length. Ten or twelve feet.

Q. Do you mean by that, Mr. Russell, that the front of your car was ten feet west of the back of the first parked car, the easternmost parked car? A. No. It was ten feet from where I seen the boy, ten or twelve feet from where I seen the boy.

Q. Well, how far from the rear of that car, the easternmost car, was the front of your car when you first saw the boy? A. The front of my car was approximately even with the rear of that car. 20

Q. When you saw the boy? A. When I seen the boy run out.

Q. All right. How long would you say the car was that was parked there, about? A. Oh, I would say approximately twelve feet.

Q. Twelve feet. You didn't see any truck coming in the opposite direction that passed you, did you? A. No, sir. 30

Q. Was there any car approaching from the opposite direction just before the impact? A. Not that I noticed.

Q. Well, was there? A. I don't know.

Q. Now, how far from the left-hand side of your car—what was the distance between the left-hand side of your car and the curb on the north-erly side of Twentieth Avenue? A. Approximately fifteen feet. 40

*John K. Russell, for Defendant—Cross.*

Q. Well, the street, you said this morning, was about forty feet wide, didn't you? A. Yes, sir. Yes, sir.

Q. And you told me a little while ago that you were on the southerly part of that imaginary center line; is that correct? A. That is right.

10 Q. I mean the left part of your automobile. A. That is right.

Q. So that, then, there must have been twenty feet from the center line to the northerly curb-line, wasn't there, if it was forty feet wide? A. Yes, sir.

Q. You saw the boy ten or twelve feet ahead? A. Yes, sir.

20 Q. Now, will you indicate for my benefit, please, and the Court and jury what you consider to be ten or twelve feet? We will compromise and say eleven. Tell me when to stop or come forward. A. Come forward.

Q. Come forward? A. About there.

Q. Here? A. Yes, sir; from me to you.

Q. What is that? A. From me to you.

Q. There was that distance between the front of your car and the boy when you first saw him; is that correct? A. Yes, sir; that is right.

30 Q. And it was at least twenty or more feet to the left of you; is that true? A. Yes, sir.

Q. Why didn't you bear abruptly left? A. I tried to.

Q. What was to prevent you from turning abruptly left and avoiding the boy? Nothing coming, was there? A. You can't turn an automobile at rightangles.

Q. You told Mr. Fryling that you were going twenty or twenty-five miles an hour. Is that true? A. Yes, sir.

40

*John K. Russell, for Defendant—Cross.*

Q. Where you first saw the boy, Mr. Russell, if you drew a line from the curb, the northwest curb of Dover Street and Twentieth Avenue, south, was the boy on the crosswalk? A. That I couldn't say, from where I first saw the boy.

Q. Well, do you know exactly where the point of impact was between the car and the boy? A. I would say it was approximately at the crosswalk. 10

Q. At the crosswalk. Now, you were going twenty or twenty-five miles an hour, and when you were ten or twelve feet from the crosswalk you saw the boy? A. Yes, sir.

Q. That is right? A. Yes, sir.

Q. And that was the first time you jammed on your brakes; is that true? A. Yes, sir.

Q. Where was the boy when you first saw him, Mr. Russell? A. Standing on the sidewalk. 20

Q. Standing on the sidewalk? A. He wasn't standing perfectly still; he was moving around.

Q. Moving around? A. Yes, sir.

Q. When was the next time you saw him? A. When he dashed out from in front of the parked car.

Q. Did you see him leave the curb? A. No, sir.

Q. You didn't? A. No, sir.

Q. Where did you see him next? How far out from the intersection or curb? A. He was approximately six feet, he was on— 30

Q. Six feet from the curb? A. Yes, sir.

Q. How far out from the curb was he when the car which you were driving struck him? A. Approximately eighteen feet.

Q. Eighteen feet. And he was running? A. Yes, sir.

Mr. Duffy: No further questions.

*John K. Russell, for Defendant—Re-direct—  
Re-cross.*

*Re-direct examination by Mr. Fryling:*

10 Q. Just a moment, please, Mr. Russell. In answer to a question asked by Mr. Duffy, I believe you said that the left side of your car was fifteen feet away from one of the curbs. Which curb did you mean? A. The north curb.

Q. That would be your left or right-hand side? A. The left-hand side.

Q. Is that after you stopped or as you were driving along the street? A. That was after I stopped.

Q. Now, how far from that curb were you before the boy ran out and before you swerved left? A. I would say approximately twenty-two feet.

20 Q. You referred, also, to a crosswalk. Can you tell us whether or not any crosswalk was marked off there, with paint or anything of that sort? A. No, sir; there is not.

Mr. Fryling: That is all.

*Re-cross examination by Mr. Duffy:*

Q. Was there, as you passed Martin Street, any crosswalk marked off? A. Not that I noticed.

30 Q. Was there any as you passed Lewis Street on your way to the hospital? A. Not that I noticed.

Q. You said you didn't want to move the boy? A. No, sir.

Q. You said you took first-aid? A. Yes, sir.

The Court: First-aid, yes.

Q. Whereabouts? A. Down at the Public Service.

40 Q. Wasn't that, Mr. Russell, because—I will withdraw that. Wasn't the reason that you didn't want the boy moved so that you could get

*John K. Russell, for Defendant—Re-cross.*

the names and addresses of witnesses before he was taken to the hospital? A. No, sir.

Q. Weren't you more concerned with measurements than with first-aid? A. No, sir.

Q. When you looked at the boy did you see him bleeding from the ear or from the mouth? A. Yes, sir, I did. 10

Q. You did? A. Yes, sir.

Q. What did they instruct you in this first-aid course was necessary to be done if a person is bleeding from the ear? A. To get a doctor as soon as possible.

Q. Get the doctor or get to the doctor? A. Get a doctor or an ambulance as soon as possible.

Q. And what was your concern that day, to get an ambulance or a doctor or take him to the hospital? A. To get an ambulance there as soon as possible. I didn't know whether he had any bones broken or not. 20

Q. And you made no examination to determine that? A. No, sir, I did not.

Q. He was rolled up in a ball? A. No.

Q. Or rolled up in a crouched position? A. No. He was laying on his side. He appeared to be laying on his side.

Q. Just one more question: You said that the boy was propelled forward for how many feet? A. He was laying approximately eight feet in front of the car. 30

Q. All right. From the moment you struck him until your car stopped, how many feet did it traverse—the car? A. I would say approximately a foot.

Q. A foot? A. Yes, sir.

Q. So that, then, according to you, the boy was only knocked ten feet ahead; is that correct? A. Approximately eight feet. 40

*William Mollina, for Defendant—Direct.*

Q. Eight feet? A. Yes, sir.

Q. And where was he with reference to Dover Street and Twentieth Avenue when somebody else picked him up? A. He was at the intersection.

Q. Which intersection? A. The intersection of Dover and Twentieth Avenue.

10 Q. The easterly intersection or the westerly intersection?

Mr. Fryling: If the Court please, there is only one intersection.

The Court: You can't do it that way. You ought to get a curb-line or street line or property line or something.

20 Q. Was the boy nearest the curb-line that would be extended from the tavern north, or was he near the imaginary curb-line that would be extended from the empty lot on the northeast corner? A. He was nearer to the curb on the west side of Dover Street.

Mr. Duffy: That is all.

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WILLIAM MOLLINA, SWORN.

30 *Direct examination by Mr. Fryling:*

Q. Mr. Mollina, you are also employed by the Public Service Electric and Gas Company? A. Yes, sir.

Q. Were you riding in the car with Mr. Russell at the time of this accident? A. I was.

40 Q. Now, will you tell the ladies and gentlemen and the Court what you saw? A. Well, as we were proceeding east on Twentieth Avenue and approached the intersection of Dover Street, I

*William Molina, for Defendant—Direct.*

saw a boy suddenly run out into the roadway directly in front of the car and I felt the car swerve to the left, and then I saw the boy lying in the roadway ahead of the car.

Q. Now, can you tell me whether or not the brakes on the car were applied? A. Yes, I could feel the brakes being applied. 10

Q. And can you tell me how far away this boy was when he came out from behind the parked car, as nearly as you can? A. As far as I remember, the boy was about fifteen feet ahead of our car when I first saw him.

Q. About how fast was your car going? A. Approximately twenty miles an hour.

Q. You were in the front seat? A. I was.

Q. There was only one seat in that car? A. Yes. It is a coop. 20

Q. You were on the right-hand side? A. On the right-hand side.

Q. Did the car come to a stop afterwards? A. Yes, the car was stopped.

Q. Can you tell me where the boy was then, from the position of the parked car? A. You mean the distance ahead of the car?

Q. Yes. A. About ten feet.

By the Court: 30

Q. Ten feet ahead of which car? A. Of the car that I was driving in.

By Mr. Fryling:

Q. That is what I meant. Ten feet from the car in which you were riding and which had stopped? A. Yes.

Q. And about where was that with respect to the middle of Twentieth Avenue? A. I don't understand the question. 40

*William Mollina, for Defendant—Direct.*

Q. In what part of Twentieth Avenue was the car stopped? A. Near the center of the road.

Q. Do you know where it was with respect to the Dover Street intersection? A. Why, I recall it was somewhere in the intersection.

10 Q. When you saw this boy coming out, what was his gait? A. He was running.

Q. What did you do after the accident? A. Why, I got out of the car after Mr. Russell, and then someone picked the boy up and we followed him to the hospital.

Q. Did anyone say anything about an ambulance? A. I don't recall hearing that said.

Q. The boy was taken in the car? A. Yes.

Q. What did you do then? A. We followed the car.

20 Q. And where did you go? A. To the General Hospital.

Q. Did you also talk to police officers who later came? A. I gave them my name and address.

Q. Can you tell us what part of the automobile came in contact with this boy? A. The right front of the car.

Q. Is there any question in your mind about that? A. No, because I saw the dent in the car after.

30 Q. And as it happened could you see where the boy was? A. I couldn't be sure whether it was the right or the center that struck the boy, but I remember seeing the dent in the right-hand side of the car in the garage.

Q. Do these pictures show the dent that you refer to? A. The top of that grille appears to be dented, yes.

40 Q. Looking at both of them? A. Yes, there is a dent on the right side of the car, or the left of the picture.

*William Molina, for Defendant—Cross.*

Q. The left side of the picture, but that is what side of the car as the car faces? A. The right side of the car; the left side of the picture.

Q. By the way, do you happen to know anything about the left front fender? A. No, I don't.

Q. Could you say whether or not that condition was there before this accident? 10

Mr. Duffy: I object. He says he doesn't know.

The Court: He says he doesn't know. He said he doesn't know.

Mr. Fryling: All right. Cross examine.

*Cross examination by Mr. Duffy:*

Q. Mr. Molina, do these pictures show a dent in the center of the grille? A. It is hard to say from the pictures. It is close to the center, I would say. 20

Q. Close to the center. Do the pictures show a dislodgement from that piece of iron? A. Yes, sir.

Q. In the center line?

Mr. Fryling: I object to that, your Honor.

The Court: Wait a minute. That is the same thing. You are asking this witness to interpret the picture. I sustain the objection. 30

Q. Mr. Molina, did I understand you to say you worked for the Public Service? A. I do.

Q. Have you spoken to anybody about this case? A. Yes, I have.

Q. With whom? A. Our claim department and Mr. Russell and Mr. Fryling here. 40

*William Molina, for Defendant—Cross.*

Q. Mr. Fryling? A. And I discussed it at home.

Q. I beg your pardon? A. At home.

Q. And you want to help the company? A. I want to tell the truth.

Q. Well, and by so doing help the company?

A. If it helps them, yes.

10 Q. You indicated your car was going twenty miles an hour? A. That is my estimation, about twenty miles an hour.

Q. And had it been going twenty miles an hour before this accident took place?

Mr. Fryling: I object, if the Court please. It is immaterial as to what the car was doing at any other time.

20 The Court: If you notice, that would include, of course, the time immediately preceding the impact.

Mr. Fryling: If the question was limited to that I wouldn't object.

The Court: If it meant when they started out, then it would be immaterial. I think the question should be limited.

30 Q. Just before this happened, the instant before this accident happened, the car was going along about twenty miles an hour? A. It was going along about the same speed. I didn't notice any change of speed, if that is what you mean.

Q. There was no change in speed whatsoever, was there? A. Not that I noticed.

Q. There was no noticeable change of speed in that car, say, from Martin Street to where the accident took place, was there? A. I didn't notice any, no.

40 Q. No cessation of the rate of speed that you remember? A. Only when we approached, as I

*William Mollina, for Defendant—Cross.*

saw the boy run out, I could feel the brake being applied.

Q. The brake? A. Yes.

Q. But up until the instant the brake was applied there was a constancy of speed; is that right? A. Yes.

Q. And the point where the boy walked, ran, or trotted out was an intersection, was it not? A. It was close to an intersection. 10

Q. Where you saw the boy first? Where did you see the boy first, Mr. Mollina? A. Why, in the roadway.

Q. How far in the roadway? A. Why, I could see the car and I could see him come from in front of the car, that is, as he left the front of the car.

Q. How far out from the left side of the car that was parked on Twentieth Avenue was he when you first saw him? A. Just about half a foot or so. 20

Q. Half a foot or so? A. Towards the center of the road.

Q. How far was the front of the car in which you were riding from that boy? A. At the moment I saw him?

Q. Yes, at the instant you saw him? A. Approximately fifteen feet.

Q. Fifteen feet? A. Uh huh. 30

Q. And did the driver of the car in which you were riding apply his brakes immediately? A. That I don't know.

Q. Did you see a truck going in a westerly direction? A. I didn't notice any cars.

Q. Did you notice any car on the northerly side of that road between the time you first saw the boy and the time the car hit him? A. No, I didn't.

Q. Was there any? A. I don't remember. 40

*William Molina, for Defendant—Re-direct.*

Q. Well, was there anything to obstruct the driver of your car from turning abruptly left?

Mr. Fryling: I object, if the Court please. The proof is he didn't.

Mr. Duffy: If he saw it.

10

The Court: Wait a minute. The point about it is that involves an action on the part of the driver of the car. Now, you are trying to get from this witness the condition of traffic, and it has to be done by a different type of question. I sustain the objection.

Mr. Duffy: All right.

20

Q. Mr. Molina, at the instant you saw the boy, when he was fifteen feet away in front of your car, did you feel a violent pulling to the left of the car in which you were riding? A. Yes, I did.

Q. Did it go right over to the left side of the road? A. No, it went diagonally.

Q. And how far across the center? A. Why, somewhere near the center. I wouldn't be sure of the distance.

Q. Did it go over on the northerly portion of the road and pass the imaginary center line? A. I couldn't be sure.

30

Mr. Duffy: That is all.

*Re-direct examination by Mr. Fryling:*

Q. When you spoke to the people that you mentioned about this accident—and to myself the other morning—did anyone tell you what to say? A. No one.

Q. One of the investigators came to see you soon after the accident? A. He did.

40

Q. Did you give him a statement as to what happened, what you knew about it? A. I did.

*William Mollina, for Defendant—Re-cross.*

Q. And did I ask you questions about it Tuesday morning of this week? A. Yes, sir.

Q. And did you tell me then what you knew about the accident? A. I did.

Q. And what you had to say at the time that you gave the statement to the investigator and what you told me and what you testified to today, is that the same thing? A. It is. 10

Q. And is that all you— A. As I remember it today. Of course, that was two years ago.

Q. And that is all that you know about the accident? A. That is all.

*Re-cross examination by Mr. Duffy:*

Q. Mr. Mollina, who was the person that took the statement from you and reduced it to writing? A. Mr. Lafrican of the Public Service claim department. 20

Q. Now, did he write that down as you recited it? A. He did, word for word.

Q. Just one or two omitted questions: How many feet did that boy go or traverse— A. Across the street?

Q. (Continuing) —from the instant you first saw him until you struck him? A. Oh, it happened so suddenly, it appeared to be about ten feet from the curb. 30

Q. Ten feet? A. I mean he was ten feet out in the roadway from the south curb of Twentieth Avenue, approximately.

By the Court:

Q. That is when it came to rest? That is where the body came to rest? A. Where the impact occurred. 40

*William Mollina, for Defendant—Re-cross.*

Q. The question asked you was whether you could tell how far his body traveled after the impact. A. Oh, after the impact?

Q. To the point where it came to rest in the street. A. Well, now, the boy, as I remember, appeared to be about ten or twelve feet ahead of the car.

10 Q. When? When the car stopped? A. When the car stopped and the boy came to rest.

Q. Ten or how many feet? A. Ten or twelve feet. I am judging these distances.

Q. Oh, yes, just estimating them.

By Mr. Duffy:

Q. Mr. Mollina, when you first saw the boy before he was struck, you said he was in the roadway? A. He was running in the roadway.

20 Q. And he was about how many feet from, say, to the north of the car that was parked? A. Well, when I first saw him running he was just about a half a foot beyond the car.

Q. A half a foot beyond the car? A. Running towards the north side.

Q. And you were about twelve or fifteen feet west of that; is that so? A. Yes, that is right.

30 Q. How many feet did that boy travel before he was struck by the car? A. Well——

Q. From the instant you first saw him until he was struck? A. I should say about three or four feet.

Mr. Duffy: That is all.

*Joseph Moore, for Defendant—Direct.*

JOSEPH MOORE, SWORN.

*Direct examination by Mr. Fryling:*

Q. Mr. Moore, are you employed by the Public Service Electric and Gas Company? A. I am.

Q. And were you in the employ of that company in April, 1939? A. I was. 10

Q. Where were you at the time of this accident? A. I was driving east on Twentieth Avenue.

Q. In front of or in back of the car that was involved? A. In back.

Q. Can you tell us about how far in back? A. Well, I would say between twenty and twenty-five feet.

Q. What speed were you traveling at? A. Between fifteen and twenty miles. 20

Q. And you say this car was ahead of you? A. That is right.

Q. Can you tell us what speed, in your opinion, in your estimation, that car was traveling? A. Well, between twenty and twenty-five.

Q. Now, tell the Court and jury, these ladies and gentlemen, what you saw and what you know about this accident. A. Why, I was driving east on Twentieth Avenue and I seen the two boys playing on the sidewalk and I watched them for my own protection, and as I did I got up closer and watched them and the first thing you know I seen them come from behind the parked car in the road, running. 30

Q. Did you see them run from the sidewalk to the street? A. No, I didn't see them run from the sidewalk, but I seen them come from behind the car, running.

Q. On what side of that car did you then see them? In other words, what was your line of vision? A. Driving, you mean? 40

*Joseph Moore, for Defendant—Direct.*

Q. No. As you saw them come from behind that parked car, how did you see them? Looking along the right side of the parked car, through it, or to the left of it? A. Looking on the right when I was driving.

10 Q. On the right? A. They was on the right side; that would be the south side.

Q. That is when they were on the sidewalk? A. No, when they came from behind the car in the road.

Q. I am referring to the parked car. A. Well, the parked car was on my right.

Q. Yes. And on what side of that did you see these boys as they were running, as you described? A. From behind the car? They came from behind the car.

20 Q. From the position that you were in, can you give an estimate as to where the car Mr. Russell was driving was with respect to the position of that boy as he ran out? A. You mean after he struck the boy?

Q. Maybe I didn't make that question very clear. Can you tell us approximately where Mr. Russell's car was, that is, how close to the boy it was, as the boy ran from behind the parked automobile? A. Well, no, I couldn't say that, for the  
30 simple reason—

Q. You couldn't see that? A. No, I didn't.

Q. Did you stop? A. I did.

Q. Where this accident happened? A. Yes.

Q. And did you see the boy on the street before he was picked up? A. I did.

Q. Can you tell us how far in front of Mr. Russell's car the boy was after both had stopped? A. Well, he was between ten and twelve feet.

40 Q. Did you follow him to the hospital? A. I did.

*Joseph Moore, for Defendant—Cross.*

Q. In your own car? A. I did.

Q. And did you speak to the policeman that came to the hospital? A. I did.

Q. Or the detectives? A. Yes.

Q. Now, were you working at the time of this accident? A. No.

Q. What time of day did you work at that time, in April of 1939? A. I believe it was eight o'clock at night to four in the morning. 10

Mr. Fryling: Cross examine.

*Cross examination by Mr. Duffy:*

Q. Mr. Moore, you said you didn't see them run; is that correct? You told Mr. Fryling you didn't see the boys run? A. Then I misunderstood his question. 20

Mr. Fryling: I object, if the Court please. That isn't what he said.

The Court: I don't recall him saying that.

Mr. Duffy: I am perfectly willing to have Mr. Shaw go back in the record. It is important, Judge.

The Court: All right.

(The reporter read as follows from the direct examination of the witness:) 30

“Q. Now, tell the Court and jury, these ladies and gentlemen, what you saw and what you know about this accident. A. Why, I was driving east of Twentieth Avenue and I seen the two boys playing on the sidewalk and I watched them for my own protection, and as I did I got up closer and watched them and the first thing you know 40

*Joseph Moore, for Defendant—Cross.*

I seen them come from behind the parked car in the road, running.

“Q. Did you see them run from the sidewalk to the street? A. No, I didn’t see them run from the sidewalk, but I seen them come from behind the car, running.”

10

Q. You said you didn’t see them run from the sidewalk; is that correct? A. That is right.

Q. Now, as I understand it, you were riding along Twentieth Avenue in an easterly direction; is that so? A. That is right.

Q. And how far in back of the car that was driven by Russell, about? A. You mean my car?

Q. Your car. A. About twenty-five feet.

20 Q. And at the time that the boy was struck by Russell’s car, how far in back of Russell’s car was the front of yours, approximately? A. Well, I would say after I stopped, about ten feet.

Q. Well, at the instant of the impact how far behind it was it? A. How far?

Q. Yes. A. About twenty.

Q. About twenty feet. Was it behind the second parked car that was west of the one pointing toward the river? A. Behind Mr. Kent’s car, right exactly behind Mr. Kent’s car.

30 Q. Who is Mr. Kent? A. Mr. Russell’s car.

Q. Mr. Russell’s car? A. Yes.

Q. About twenty feet? A. Not when I stopped, no.

Q. At the time the boy was struck you said you were twenty feet behind him? A. Twenty-five feet.

Q. Was there a car parked on your right? A. The car that the boys ran in back of, yes.

40 Q. Was there a car west of that? A. I didn’t take notice to it.

*Joseph Moore, for Defendant—Cross.*

Q. Was there only one car that you remember being on the right side of Twentieth Avenue as you go east? A. I was interested watching the boys, and that is all I remember.

Q. You said when you saw them you slowed up; is that correct, Mr. Moore? A. I don't recall it.

Q. Well, did you slow up? A. Oh, yes.

Q. Did the car in front of you slow up or did it keep that constant speed of twenty or twenty-five miles an hour, if you observed it? A. No, I would say the driver of the first car tried to use his brakes to avoid hitting the boy.

Q. When he first saw him?

Mr. Fryling: I object. How could this witness know when?

Mr. Duffy: Well, he is saying so.

The Court: How could he say it? You don't have to use the other man's eyes.

Mr. Duffy: Well, he is being a prestidigitator. I think it is up to him, Judge Wolber.

The Court: Your question is objectionable. I sustain the objection.

Mr. Duffy: Very well. Allow me an exception.

The Court: Granted.

Q. What kind of a car were you riding, Mr. Moore? A. 1938 Chevvy.

Q. Was it a left-hand drive or a right-hand drive? A. Left-hand drive.

Q. You don't remember whether or not there was more than one car on the right side of the street, do you? A. I do not.

Q. You just remember one, don't you? A. One car, that is right.

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*Joseph Moore, for Defendant—Cross.*

Q. Could you see the boys through that car?  
A. No, I couldn't. After\* they came from behind the car in the road I did.

Q. Were they in front of the Russell car when they came in the road? A. I couldn't say that. I couldn't say that.

10 Q. Well, for how long a period of time did you see the boys? A. Just after they left, running from behind the car.

Q. Well, how long? A second, two seconds, or a minute? A. Oh, it happened so quick, I guess it was only a couple of seconds.

Q. Mr. Moore, when did you first start to slow down? A. When?

Q. Yes, sir. A. Well, I wasn't going fast. I was only going—

20 Q. All right. When did you reduce your speed for the first time in the general vicinity of Dover Street and Twentieth Avenue? A. When I seen Mr. Russell's car go over from avoiding hitting the boy.

Q. You didn't slow down when you first saw the boys, did you? A. Oh, yes, sure, I slowed down to a certain extent.

Q. Oh, you did? A. Yes.

Q. When was that? A. As soon as I seen them.

30 Q. As soon as you saw the boys you slowed down? A. That is right.

Mr. Duffy: That is all.

By the Court:

Q. Just a moment. I want to ask you a question. You say you saw the boy or boys? Did you see two of them in the street? A. No, sir, I only seen the one. I seen the two boys on the sidewalk.

40 Q. On the sidewalk? A. That is right.

*Joseph Moore, for Defendant—Cross.*

Q. Then you saw one boy do what? Come from behind the car? A. Running.

Q. Running from behind the car? A. Yes.

Q. When you say "behind the car," which way was that parked car facing? A. I believe it was facing on the wrong side of the street.

Q. In other words, the front of the car was towards you? A. The front of the car was facing west. 10

Q. It would be facing west? A. Yes.

Q. Now, from what end of the car did that boy come running? A. In back of the car.

Q. That would be the end farthest east? A. That is right.

Q. Is that right? A. Yes, sir.

By Mr. Duffy: 20

Q. Mr. Moore, just one or two questions: Did you pick the boy up? A. I didn't touch the boy.

Q. Did Russell pick the boy up or touch him? A. I couldn't say that. I don't recall.

Q. Did Russell pick him up? A. I couldn't tell you.

Q. Did you see somebody else pick him up and put him in another car? A. But by the time I got in front of the car they was just picking him up and putting him in the car. 30

Q. In a car other than Russell's or yours; is that right? A. That is right. That is right.

Q. Was Russell's car runnable, was it operable, to coin a word? A. You mean was the motor running?

Q. Did he use the car after he struck the boy? A. Oh, yes, sure. He drove to the hospital.

Q. Did you use yours? A. Yes, sir.

Mr. Duffy: That is all. 40

*John W. Haffer, for Defendant—Direct.*

JOHN W. HAFFER, SWORN.

*Direct examination by Mr. Fryling:*

Q. Mr. Haffer, you are employed by the Public Service Electric and Gas Company? A. Yes, sir.

10 Q. You are also employed by the Public Service Coordinated Transport? A. Yes, sir.

Q. What kind of work do you do? A. Investigations.

Q. Was that your work during April, 1939, and ever since that date? A. Yes, sir.

Q. I show you three pages marked D-4 for identification. With the exception of the printed matter and the signatures on the bottom of each page and the two and a fraction lines at the end, in whose handwriting is that? A. In Mr. Caspell's.

20

Q. No. With the exception of the others, excepting for the signatures? A. Yes.

Q. And the two and a fraction lines, in whose handwriting is the rest of it? A. Mine.

Q. Now, does that document refresh your recollection as to a conversation that you had with someone? A. You mean reading this?

Q. Yes. A. It will, yes.

30 Q. Who was the conversation with? A. James A. Caspell.

Q. Can you tell us whether or not that is the witness who testified this morning here? A. Yes, sir.

Q. When did that conversation take place? A. It took place on April the 24th, 1939, about noon, at the North Jersey Training School.

40 Q. Now, if necessary you may refer to that paper to refresh your recollection. Will you tell us what Mr. Caspell had to say about this accident?

*John W. Haffer, for Defendant—Direct.*

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

The Court: That isn't the way to do that. Why not let him identify it and read it to himself and then offer it in evidence?

Mr. Fryling: I will do it that way.

The Court: That would be the best way. Then it may be read to the jury, if it is admissible. 10

Q. Does that paper set forth what Mr. Caspell told you about this accident? A. Do you want me to read this?

By the Court:

Q. You may read it to yourself. A. Oh, to myself? 20

Q. Look it over. Read it to yourself.

By Mr. Fryling:

Q. Can you tell us just from looking at it, Mr. Haffer? A. Yes, sir. That is the three.

By the Court:

Q. Have you looked over the three pages? A. No, sir, not the three. 30

Q. You better look them over, because they are going to ask you about them. A. All right. Yes, sir.

By Mr. Fryling:

Q. Now, after you reduced that document to writing did Mr. Caspell read it? A. Yes, sir.

Q. If you know? A. Yes.

Q. Did you ask him if it was correct? A. Yes, sir. 40

*John W. Haffer, for Defendant—Direct.*

Q. And what did he say about that? A. He said it was correct.

Q. Did you ask him to write down anything on that paper? A. Yes, sir.

Q. What was that? A. I asked him if it was correct to write down, "I have read the above statement and find it to be true and correct."

10

Q. Did he write that down? A. Yes, sir.

Q. In your presence? A. Yes, sir.

Q. Then did he sign each page in your presence? A. Yes, sir.

Mr. Fryling: I offer the statement in evidence, if your Honor please.

Mr. Duffy: May I read it, Mr. Fryling?

The Court: Now you may.

20

Mr. Duffy: No objection.

(Papers heretofore marked D-4 for identification now marked Exhibit D-4 in Evidence.)

Q. Now, I show you another paper. Is this in your handwriting? A. Yes, sir.

Q. Does that refresh your recollection as to anything further that took place during that conversation with Mr. Caspell? A. May I read it?

30

The Court: Go ahead. Proceed.

Q. Did you ever ask Mr. Caspell if he had been employed by the Public Service Electric and Gas Company? A. Yes, sir.

Q. What did he say? A. He said he had been.

Q. What else did he have to say about that, if anything?

40

Mr. Duffy: Oh, I object to that. If it is in the statement, I have no objection to the statement going in.

*John W. Haffer, for Defendant—Cross.*

Mr. Fryling: It isn't in the statement.

The Court: Wait a minute. A statement by Haffer? He used that statement to refresh his recollection. There wasn't a word said. He read it. Now he is being asked whether he recalls at that same time he transcribed the statement signed by Mr. Caspell what else was said. Mr. Haffer has said that Mr. Caspell stated he had been employed by the Public Service. 10

Mr. Duffy: My only request at this juncture, if your Honor please, is this, that the jury be instructed this is not binding on the plaintiff, that it is introduced—that any testimony on the part of Mr. Haffer regarding his employment is in here solely for the purpose of affecting the credibility of Mr. Caspell. 20

The Court: Oh, yes, for the purpose of affecting his credibility. No question about that, for the purpose of affecting Caspell's credibility.

Q. How long ago, did he say? A. Fourteen years ago.

Q. Did he say how that terminated? A. He was discharged. He had a fight with the foreman and Mr. Benson, the superintendent of gas, refused to give him his job back. 30

Mr. Fryling: Cross examine.

*Cross examination by Mr. Duffy:*

Q. John, did he say who won the fight? A. No, he didn't, Vincent.

Q. When you talked to Mr. Caspell with reference to this statement, D-4, where was it, John? 40  
A. At the North Jersey Training School.

*John W. Haffer, for Defendant—Cross.*

Q. And what did you use to write on? A. I have a brief case with pads in the brief case, and I write on top of that on a pad.

Q. Did you put it on anything? A. I have other papers the same as that in my brief case, and I wrote on top of it with, as I say, the pad.

10 Q. Did Mr. Caspell tell you this: "Auto which boy had come in contact with was stopped about twenty feet west of where the boy laid"? A. That is correct. That is what he told me.

Q. Well, when you talked to him then, John, did you understand him to mean that the front end of the car was twenty feet from where the boy laid?

20 Mr. Fryling: I object to what this witness understood, your Honor.

The Court: It is a question of what was said, not what he thought of it.

Q. Caspell did tell you, "The auto which boy had come into contact with was stopped about twenty feet west of where the boy laid"? He said that? A. What is in that statement is what he said. I wrote down what he said.

30 Q. "Or front end of auto about on even line with west curb-line of Dover Street"? A. Yes, sir.

Q. He said that? A. Yes, sir.

Q. Now, I think we can simplify it, John, by you and I reading together: "I do not know anyone who saw this accident outside of the man from the WPA field office"? A. That is right.

Q. Did he say he had seen Moore at the scene of the accident, the man who just testified before you? A. No.

40 Q. Did he say that he had seen Mellino at the accident? A. No.

*Colloquy.*

Q. John, was this a question-and-answer interrogation? A. As I asked him he repeated to me and I wrote down.

Q. Say that again, please, John? A. I would ask him what happened. At times I had to stop to ask further, and as he answered I went on writing.

10

Q. Well, why didn't you put it down in question-and-answer form? A. I never do.

Q. How long have you been working for the Public Service? A. Well, if I live to April 13th, next month, I will be with them fifteen years.

Q. And during that time have you been investigating, John? A. That is all I have been doing.

Q. And during those fifteen years come April next with God's help and will, you have been taking statements from people? A. Yes.

20

Q. Old, young, and intermediate? A. Right.

Mr. Duffy: That is all.

Mr. Fryling: I offer in evidence the two papers marked D-1 for identification.

Mr. Duffy: I object to that, if the Court please, unless the witness L. W. Busch, who took the statement, is put upon the witness-stand to prove it formally.

30

The Court: Whose statement is it? Michael Maloney's?

Mr. Duffy: Yes, sir.

Mr. Fryling: The one who admitted everything in that paper.

The Court: Except one thing. There were one or two discrepancies, I remember.

Mr. Fryling: If your Honor please, my recollection is that in answer to my questions—

40

*Colloquy.*

The Court: I followed him, and I think there were one or two instances that there was a discrepancy. Do you say there wasn't any discrepancy at all?

Mr. Fryling: He testified that what was in here was what he said.

10 The Court: Not in every particular. I remember something about an observation that was a little bit different than he testified to.

Mr. Fryling: There was one thing in this paper—

The Court: I was going to say two.

Mr. Fryling: —and that part, if your Honor please, was this: Was the observation made before or after the truck passed? On cross examination he said that what he told Mr. Busch, although he wouldn't identify the man—he said that that was not correct.

20

The Court: A couple of days after Christmas, I remember.

Mr. Fryling: He admitted that was what he said.

The Court: You think that statement can go in? For what purpose? To affect his credibility?

30

Mr. Fryling: Yes.

(Discussion not transcribed.)

The Court: Mr. Fryling, I am afraid that the paper can't go in unless you put the person on who will meet the requirements of the rule.

Mr. Fryling: I will withdraw the offer and call Mr. Busch.

40

*Louis W. Busch, for Defendant—Direct.*

LOUIS W. BUSCH, sworn.

*Direct examination by Mr. Fryling:*

Q. Mr. Busch, you are also employed by the Public Service Electric and Gas Company? A. I am sir.

Q. And the Public Service Coordinated Transport Company? A. I am, sir.

Q. And you have been for some years? A. Some years.

Q. Now, did you have occasion to talk to Michael Maloney? A. I did.

Q. Where did you talk to him? A. At his home.

Q. Do you remember when that was? A. Around Christmas time.

Q. What year? A. 1939, I believe.

Q. Who was present at the time of that conversation? A. Two ladies and a gentleman.

Q. Do you know who they were? A. I believe one was his mother.

Q. What was the subject of your conversation, generally? A. James Rizio's accident of the previous April.

Q. Did you reduce to writing what the boy told you? A. I did, sir.

Q. The papers there before you, marked D-1 for identification, are those the papers? A. Those are the two papers, yes.

Q. The two pages? A. Yes.

Q. And after you had finished writing down what he told you did he look at it? A. He read it.

Q. Did you ask him whether or not it was correct? A. I did.

Q. What did he say about that? A. He said it was.

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*Louis W. Busch, for Defendant—Cross.*

Q. Did you ask him to write anything on the paper? A. I did.

Q. What was that? A. I asked him to write on there that he read it and it was true as written.

Q. Did he write that on the paper? A. He did.

10 Q. And was that in your presence? A. In my presence.

Q. Did you also ask him to sign it? A. I did.

Q. Did he sign it? A. Both pages.

Q. That was in your presence? A. In my presence.

Q. Now, will you tell us whether or not what was written in those two pages is a correct recital of what he told you? A. It is, sir.

20 Mr. Fryling: I now offer the papers in evidence, your Honor.

Mr. Duffy: No objection.

(Papers previously marked D-1 for identification now marked Exhibit D-1 in Evidence.)

Mr. Fryling: Cross examine.

*Cross examination by Mr. Duffy:*

30 Q. Mr. Busch, you said that you have been working for the Public Service Corporation for some years. How many years? A. 1926. Fifteen years.

Q. And in what capacities were you employed by the Public Service? A. Investigator of litigated claims.

Q. As an investigator of litigated claims, what were your duties? A. Varied.

40 Q. Recite them for the Court's information and the jury's, if you will. A. Well, as investigator of litigated claims, my duties—each case as it

*Louis W. Busch, for Defendant—Cross.*

goes into suit comes to me at that time; I am responsible for the case from then until the day it is tried.

Q. You say you are responsible for the case from the day when it comes to you as a litigated matter until the day it is tried. What do you mean, you are responsible? A. To see that the investigation is entirely up to date. 10

Q. And during the past fifteen years you have been doing that? A. Yes, sir.

Q. Could you approximate numerically how many people you took statements from, Mr. Busch, in those fifteen years? A. I doubt it.

Q. Well, could you tell us how many people a month you obtain statements from, about? A. Well, that varies, Mr. Duffy. I am sorry. It might be none a month or it might be twenty a month. 20

Q. All kinds of people? A. All kinds of people.

Q. Young people? A. Yes.

Q. Old people? A. Yes.

Q. Middle-aged people? A. Yes.

Q. Do you pursue the same course of conduct with reference to taking each statement? A. I wouldn't say that.

Q. Well, how does it vary? A. Well, there are all types of accidents Mr. Duffy. They aren't all automobile accidents. There might be anything that we had become involved in. The procedure is the same, if that is what you mean, that I visit the person and ask them if they saw the accident, and then ask them to kindly tell me what their version of it is. 30

Q. When you went to the Maloney house was Mike in? A. No.

Q. Little Mike. A. No. Mike was out playing.

Q. Did the mother go to the window and holler, "Hey, Mike, somebody wants to see you"? A. No. 40

*Louis W. Busch, for Defendant—Cross.*

She said that Michael and the other boys had been to Mr. Duffy's office and had arranged to testify for their friend, Jimmy Rizio.

10 Q. Yes? Go on. A. And I told her that was perfectly all right, but the Public Service was looking into the matter and it was just as fair for us to get a statement as it was for Mr. Duffy, which it was, both ways.

Q. Now, let me get this straight. When you went in the house and asked to see Michael Maloney his mother told you that he had been to my office and given a statement? A. Yes, yes.

Q. You made sure of that? A. No, I didn't make sure of that.

Q. You took her word for it? A. I took her word for it.

20 Q. I mean, there was no question in your mind about the veracity of that statement, was there? A. No.

Q. The fact that a plain spoken, plain woman told you the boys were down to my office was enough for you to be convinced that that was the fact? A. I wasn't interested.

30 Q. Well, Mrs. Maloney said her boy had been down to my office, then, didn't she? A. Yes. Not at that—not at that present time, no. Previous to that.

Q. Before you went to her home? A. Before I went, yes.

Q. She made that known to you, that the boy had been at my office? A. Yes.

Q. Is that correct? A. Yes.

Q. Since that time you found that fact to have been true; isn't that so? A. No, I didn't do that.

Q. You didn't check it? A. No.

40 Q. In spite of the fact that that boy had been at my office, you took a statement from him? A. Absolutely.

*Louis W. Busch, for Defendant—Cross.*

Q. Is that the practice, as far as the Public Service is concerned, to interview other lawyers' witnesses?

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

The Court: That is certainly objectionable. What is there to stop any person—we are not dealing with a lawyer now.

10

Mr. Duffy: We are dealing with ethical considerations.

Mr. Fryling: I object to that, if your Honor please.

The Court: I don't think that is justified. The question of ethics that you are referring to refers to relations between lawyers, members of the same profession.

Mr. Duffy: Certainly I am not going to discuss ethical considerations with you, Judge Wolber, but does that mean that ethics exist only between lawyers?

20

The Court: You can't deduce, in the absence of some proof, that there is a code of ethics in respect to other human beings other than lawyers, don't you see?

Mr. Duffy: Under the present circumstances, any thoughts in that direction have been dissipated, I mean as far as this picture is concerned.

30

The Court: Proceed. Is there any objection? I sustain the objection. Proceed.

Mr. Duffy: All right.

Q. Mrs. Maloney told you that her boy and the Rizio boy—withdraw that. Did Mrs. Maloney say that young Mike and Jimmy Rizio were pals, playmates? A. I think she said they were friends, Mr. Duffy.

40

*Louis W. Busch, for Defendant—Cross.*

Q. Friends? A. Yes.

Q. Was Billy Winterberg's name mentioned? A. Yes, yes.

Q. And he was also a friend of Jimmy Rizio and Maloney's? A. Yes, yes.

10 Q. And they were playmates? A. Friends. Friends.

Q. All right. Mrs. Maloney called him in after you found out he had been at my office; is that true? A. Somebody called him in.

Q. As a result of someone calling him, the boy came in. Did he sit down or stand up? A. He sat down at the kitchen table.

Q. He did sit down? A. Yes.

20 Q. Did you tell Mike Maloney that Jimmy Rizio or his father was suing the Public Service? A. I think they knew it. I don't remember telling him that.

Q. Didn't you tell it to them? A. No, no, no. I don't remember telling them.

Q. Did you tell him that this matter was in litigation and it was referred to you for investigation and to obtain statements? A. I told him I was investigating it.

Q. Did you tell him for what company? A. Oh, yes, certainly.

30 Q. Did you give him a card? A. I don't think so.

Q. Did you show him your credentials? A. I don't think so.

Q. Did you have any with you? A. I probably did.

Q. Did you proffer them or show them to Mrs. Maloney? A. I don't think so, no.

Q. You did not? A. No.

40 Q. Don't you do that when you go in? A. Not always, no.

*Louis W. Busch, for Defendant—Cross.*

Q. You don't tell people that you are from the Public Service and that suits are litigated and you are to obtain a statement? A. I told them I was from the Public Service, yes.

Q. But you didn't tell him that the Rizios were suing the Public Service, did you? A. No, I don't think I did that. 10

Q. Did you tell Mike Maloney or Mike's mother in his presence that anything you took down would be used in court?

Mr. Fryling: Oh, I object, if the Court please, I have been quiet up—

The Court: I think he has a right to go into the circumstances under which the statement was procured.

Mr. Fryling: But as to the question that is now before the Court, it is entirely improper. 20

The Court: Isn't it cross examination, was this said and was that said? Why can't he do that on cross examination? I will overrule the objection.

Mr. Fryling: Allow me an exception.

(The question was read by the reporter.)

A. I didn't know it was going to be used in court. 30

Q. Well, did you tell him it might at some time in the future be used in court? A. No. I assumed he was going to testify, if he came to court, as the statement said.

Q. What statement? A. This statement.

Q. Show me in the statement where he said he was going to testify. A. I can't. It isn't in there.

Q. What do you mean when you say that? A. I assumed that when he came into court here he was going to testify as the statement is written. 40

*Louis W. Busch, for Defendant—Cross.*

Q. Well, did you tell him, Mike, "I assume that if you come into court you are going to testify and that is why I am getting a statement"? A. No.

Q. You didn't tell him that. How old was Mike at the time you took it? A. Thirteen.

10 Q. Thirteen years old. How long did it take to get this statement? A. I guess I was there about an hour all told.

Q. An hour? A. Three-quarters of an hour to an hour, yes.

Q. Three-quarters to an hour? A. I believe so.

Q. And you were there—let's see, now. During what part of the three-quarters of an hour or an hour was Michael being asked questions by you? A. Probably the last fifteen or twenty minutes.

20 Q. Is that all? A. That is probably all, yes.

Q. Well, how long did you interrogate Michael Maloney, young Mike? A. About that time.

Q. About fifteen minutes? A. To a half hour. I can't say definitely.

Q. Well, could you approximate it with a greater degree of certainty? A. No.

Q. I mean in minutes. A. No.

Q. It is between fifteen minutes and a half hour? A. Yes.

30 Q. And it took you fifteen minutes to write this? A. No. We were talking.

Q. What were you talking about? Other things? A. I guess.

Q. Don't you remember? You remember all the circumstances very accurately about that statement? A. I wrote it down that—

Q. Did you talk about other things before or after or during? A. Before, after, and during.

40 Q. Interrupted in the middle of it? What did you talk about, if you remember? A. I don't remember.

*Louis W. Busch, for Defendant—Cross.*

Q. Did you tell Michael not to worry about making this statement? A. No.

Q. Did you tell him that it wasn't important? A. No.

Q. What was your approach to young Michael when he first came in? A. I told him, "Michael, I am from the Public Service." I said, "You were with young Rizio when the accident occurred?" and he said, "Yes." These aren't the exact words. I said, "I want you to tell me how it happened." His mother told him to go ahead and tell me the truth. I wrote it down. He signed both pages, inscribed the inscription that is under it, and that is all there was to it. He put on his hat and coat—he was anxious to go out and play—and he ran out. 10

Q. Did he use this exact language: "On our side of the street there were three automobiles parked at the curb facing east"? A. Not that exact language, no. 20

Q. Well, what did he say? A. Words to that effect.

Q. What were the words to that effect? A. I can't say now.

Q. Why can't you say? A. Because this here is a transcription of all he said.

Q. Well, it is not an accurate transcription, is it? A. A very accurate transcription. 30

Q. Well, you just said to me that Mike Maloney didn't say, "On our side of the street there were three automobiles parked at the curb facing east"? A. He may have said there were three automobiles on our side of the street.

Q. And you put in, "parked facing east"? A. No, then I asked him which way they were facing.

Q. And did he say "east"? A. He might have gone that way (indicating) and pointed up toward the park. 40

*Louis W. Busch, for Defendant—Cross.*

Q. Well, did he go that way and point? A. I don't remember, Mr. Duffy.

Q. Well, on which side of the table was he standing? East or west, north or south, or was it a round table? A. He was on the east side of the table.

10 Q. He was on the east side of the table? A. Yes, a kitchen table.

Q. A kitchen table. And where were you? A. At the south side.

Q. The south side? A. Yes.

Q. Now, when he told you that these three automobiles were parked on the south side of Twentieth Avenue pointing east, what did he do? A. He just told me that.

20 Q. Well, did he make any motion? A. I don't remember now.

Q. Did he say, "They were parked facing east"? A. Yes, he said they were parked. As I remember it, he didn't say "facing east."

Q. Well, what did he say? A. As I remember, he pointed towards the east.

Q. How? A. Because the street where the accident occurred is right in front of his house.

Q. Well, how did he point? A. I don't know how he pointed, Mr. Duffy.

30 Q. You were on the south side, as I understand it, or the north side of the table? A. I was on the south side of the kitchen table.

Q. On the south side. And then the boy would be standing somewhat the same way I am standing now? A. He was sitting.

Q. Oh, he was sitting? A. Yes, he sat down at the table.

40 Q. What did he do when he told you the cars were pointing east? A. What did he do?

*Louis W. Busch, for Defendant—Cross.*

Q. Yes. What did he do? You said that he didn't say that, but he made some motion. A. He intimated to me that they were parked facing east. He did it. How he did it I don't just know. I am sorry.

Q. You don't know? A. I am very sorry.

Q. You don't know. At any rate, he did not utter the words "at the curb facing east"? A. He uttered the words "at the curb." 10

Q. But he didn't say, "facing east"? A. He intimated "facing east."

Q. He didn't orally say to you, Mr. Busch, "facing east," did he? A. No, no, no.

Q. Then, the inclusion of those two words in there is an inaccuracy? A. No.

Q. Well, they are your interpretation of what he said, aren't they? A. Right. 20

Q. You weren't transposing to the paper his exact language, were you? A. His exact thoughts.

Q. His exact language? A. No.

Q. How did you know what he was thinking? How do you know what I am thinking now? A. I can imagine.

Q. Would you dare utter it? A. No.

Q. Did Mike Maloney say, "We were looking at a boy who was sitting in his wagon facing west on the opposite side of the street"? A. Yes, all but the "facing west." 30

Q. Well, who put that in? A. I did.

Q. Well, why did you put it in if he didn't say it? A. Because he described to me where the boy was sitting in his wagon.

Q. And where did he say he was? A. On the opposite side of the street, of Martin Street.

Q. On the opposite side of what street? A. Twentieth Avenue. 40

*Louis W. Busch, for Defendant—Cross.*

Q. Well, why didn't you put that in here? A. That is what he told me.

Q. What? A. Because that is what he told me.

Q. Why didn't you put it in here, that he was by Martin Street? Find where Martin Street is in there, on the northeast corner of Twentieth Avenue and Martin Street. A. I am sorry. It isn't here.

Q. You can't find Martin Street in there, can you, Busch? A. No. I am sorry.

Q. So that something he did say to you wasn't put in the statement; isn't that true? A. Repeat that again.

Q. Something that Mike Maloney said to you about Martin Street and an automobile or a wagon wasn't put in the statement, was it? A. The "wagon" is in there.

Q. Is "Martin Street" in here? A. No, I don't think "Martin Street" is in there.

Q. Now, did Michael Maloney when you were talking to him say this—how old was he at the time? A. Thirteen.

Q. Thirteen? A. Yes.

Q. At the time you took this statement? A. Yes.

Q. Are you sure? A. May I see it? I may be mistaken now, Mr. Duffy.

Q. Sure, you may see it. A. Thirteen.

Q. Thirteen. Did you ask him what grade he was in? A. No, I didn't.

Q. Did you graduate from high school? A. Yes.

Q. College? A. No.

Q. Did he say this, "where he was struck by the right front fender of an automobile that was going quite fast east on Twentieth Avenue"? A. Yes.

Q. He did say that? A. Yes.

*Louis W. Busch, for Defendant—Cross.*

Q. Did he use the words "going east"? A. As I say, the boy wasn't clear on directions. He gave me those directions by pointing and intimations.

Q. Did he say, "going east"? A. No, no, no.

Q. Did he say, "going quite fast"? A. Yes.

Q. There is no question about that? A. None whatsoever.

10

Q. No question about him having told you on that day that the automobile driven by Russell was going quite fast, is there? A. None.

Q. Now, did thirteen-year-old Mike Maloney say, "I stopped running in time to avoid being hit"? A. Yes.

Q. Did he say, "to avoid being hit"? A. Yes.

Q. He used the word "avoid"? A. Yes.

Q. You are sure of that? A. Quite positive.

20

Q. Then you told Michael Maloney to write on there in his handwriting, "I have read this statement and this is true"? A. After reading it, Mr. Duffy.

Q. Do you do that with all statements? A. Yes.

Q. Every one of them? A. Yes.

Q. Boys? A. Yes.

Q. Youths? A. Yes.

Q. Men, women, and children, and so forth? A. Yes.

Q. Did Michael Maloney say, "My house faces Dover Street, which runs into Twentieth Avenue"? A. Yes.

30

Q. He did say that? A. Yes.

Q. Why would you ask him that, Mr. Busch?  
A. To orient the place where he was on the street.

Q. You were in the house, weren't you? A. Yes.

Q. And did the house in which Michael Maloney lived face Dover Street? A. Yes.

Q. And you had gone into the door of that house? A. Yes.

40

*Louis W. Busch, for Defendant—Cross.*

Q. And you were sitting in it? A. Yes.

Q. And you knew that Dover Street was across the street? A. Yes.

Q. Why was it important for him to tell you that? A. I don't know.

10 Q. What do you mean, you don't know? You have been taking statements, as you told this Court and jury, for fifteen years. Why did you put something in there if you didn't think it was important? A. I don't quite follow you. I thought it was important at the time.

Q. Did Mike Maloney have to have any assistance in spelling the word "statement"? A. No, no.

Q. Did he write that word? A. "Statement"?

Q. Yes. A. Yes.

20 Q. Just one more question and I will be finished, Mr. Busch. Did Mike Maloney say, "I and Rizio" in this statement, right here. "I and Rizio"? A. Yes.

Q. He did? Did he also say, "A big truck passed in front of us"? It is in here. Did he say that? A. Yes, he said "truck." That is in there, Mr. Duffy.

30 Q. Did he say, "We then looked both ways up and down the street and did not see anything"? A. Yes.

Q. No question about that? A. No question at all, no.

Q. "A big truck passed in front of us"? A. Yes.

Mr. Duffy: No further questions.

Mr. Fryling: The defendant rests.

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(The Defendant Rested.)

*James Brooks, for Plaintiff—Rebuttal—  
Direct—Cross.*

PLAINTIFFS' TESTIMONY IN REBUTTAL.

JAMES BROOKS, SWORN.

*Direct examination by Mr. Duffy:*

Q. Detective Brooks, you have been connected with the Paterson Police Department for how long? A. Thirty-three and a half years. 10

Q. And you are presently connected with the detective bureau; isn't that so? A. I am.

Q. On April 10, 1939, did you visit the General Hospital in response to a call concerning an accident? A. I did, in company with Detective Hermann.

Q. Did you see Mr. Russell, the gentleman with the iron-grey hair? A. I did. 20

Q. Did he at that time say to you that the damage done to the car that he was driving was on the left front grille? A. No. We inspected the car ourselves. He didn't tell us.

Q. Did you make a report after inspecting the car? A. Yes.

Q. When you inspected the car, Detective, did you see any damage to it? A. Yes.

Q. Where was it? A. The left front grille.

Mr. Duffy: Cross examine. 30

*Cross examination by Mr. Fryling:*

Q. I show you a picture, marked D-6. Is that the car? A. I wouldn't know that.

Q. Does that look like the car? A. This is a Ford coop. I don't know whether this is the car or not.

Q. Does that look like the car? A. It looks like the Ford coop we saw in the yard, yes. 40

*James Brooks, for Plaintiff—Rebuttal—  
Cross.*

Q. I show you D-5, another picture. Does that look like the car, the way the car looked when you looked at it after the accident? A. No, I wouldn't say. From the photograph I don't know what car that is.

10 Q. D-6, that does look like it? A. It is a Ford coop, yes.

Q. Can you tell me where on this picture this damage that you are talking about is?

Mr. Duffy: Just a moment. I object to that.

The Court: Now, again you are getting into the same thing we had before.

Mr. Duffy: Two wrongs don't make a right.

20

The Court: I am going to sustain the objection. We can't let him interpret the picture. The pictures must speak for themselves.

Mr. Fryling: I will reframe the question.

Q. We have here a picture of an automobile, Officer? A. Yes.

30 Q. Can you show us on the car pictured there, whether or not it is the same car that you saw, on what part you saw the damage?

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

The Court: Well, now, he did identify that, didn't he, as being the car, D-6?

Mr. Fryling: I said whether or not it is the car.

40 The Court: It would have to be based upon the idea that it was the car to test him out on cross examination, don't you

*James Brooks, for Plaintiff—Rebuttal—  
Cross.*

see? You couldn't have an alternative in that it might not be the car.

Mr. Fryling: I will reframe the question again, your Honor.

Q. Show us on that picture where the damage was that you described. 10

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

The Court: That is different. I shall overrule that objection.

Mr. Duffy: Very well.

A. Right in here (indicating).

Q. Will you point that out so the ladies and gentlemen can see? A. Right in here. It was dented in a little and freshly scraped.

Q. What was that? A. Dented in a little and freshly scraped, right in there. 20

By the Court:

Q. Dented in a little and what? A. And freshly scraped, that is, it was scraped and it looked fresh.

By Mr. Fryling:

Q. Your recollection is very clear about that? A. Yes, it was the only damage visible on the car. 30

Q. You didn't see anything wrong with the right half of that grille at all, did you? A. With the what?

Q. The right half of that front grille? A. The right half? No.

Q. That is all. A. The only damage visible was what I show you on the picture of the car.

By Mr. Duffy:

Q. Did you know the Rizio family before the accident took place? A. No, sir. 40

*John Hermann, for Plaintiff—Rebuttal—  
Direct.*

Mr. Duffy: That is all. No further questions.

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JOHN HERMANN, SWORN.

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*Direct examination by Mr. Duffy:*

Q. Detective Hermann, you are connected with what Police Department? A. Yes, sir.

Q. With what one? A. Paterson Police Department.

Q. For how many years? A. Thirty-three and a half.

20 Q. Are you presently connected with the Detective Bureau? A. I am.

Q. Did you accompany Detective Brooks on an investigation on the day of April 10, 1939? A. I did.

Q. Did you accompany Detective Brooks when he inspected a Ford automobile in the hospital grounds?

30 Mr. Fryling: I object, if the Court please, I was caught napping when Detective Brooks was testifying, but this is all improper rebuttal.

The Court: No, this is not proper. In other words, you have to limit yourself on this to what was brought out on the defendant's case, and as far as these detectives are concerned up to this point, you started off all right.

Mr. Fryling: I was asleep before.

40 The Court: Now you are opening up your direct case again, Mr. Duffy. One point you haven't asked him was about the

*John Hermann, for Plaintiff—Rebuttal—  
Direct.*

visit to the hospital and that conversation with Mr. Russell. That is different. That would be different. I sustain the objection.

Mr. Duffy: Well, I am entitled to feel that counsel would slumber peacefully on.

The Court: You thought you would try it. 10

Mr. Duffy: You can't blame a guy for trying.

Q. Did you have a conversation with Mr. Russell, the good-looking man with the iron-grey hair?

A. I stood by while Detective Brooks was talking to him.

Q. Was there any mention made during that discussion about where the damage was on the car that struck the boy? A. Well, that I would have to refer back to our record on. 20

Q. Do you have it? A. Yes, sir.

Q. Well, by refreshing your recollection could you tell us that? A. Yes, sir.

Q. Do you have the report in your possession? A. Detective Brooks has it.

(A paper was handed by Mr. Brooks to Mr. Duffy.) 30

The Court: Read it to yourself to refresh your recollection, and after you have read it listen to the question and see whether you can answer it.

Q. Does that refresh your recollection, Detective Hermann? A. Yes, sir. Yes, the left front of the Ford car. 40

*Motion for Directed Verdict.*

By the Court:

Q. The what? A. The left front grille of the Ford car.

10 Mr. Fryling: If the Court please, I ask that this all be stricken out.

The Court: That will. That answer will be stricken out, because it is not responsive so far.

Q. Was anything said about the damage to the car by Russell? A. No.

Mr. Fryling: I object to the question.

The Court: He said, "No."

20 Mr. Duffy: He said, "No." No further questions.

Mr. Fryling: No questions.

(No cross examination.)

—————  
(Both sides rested.)  
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## MOTION FOR DIRECTED VERDICT.

30 Mr. Fryling: I respectfully move, your Honor, for a directed verdict in favor of the defendant, on the grounds that the proof as now before the Court shows no negligence, that is, negligence which was the proximate cause of the accident and injuries to the plaintiff;

On the further ground that the proof as now before the Court shows that the plaintiff was guilty of contributory negligence.

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*Motion for Directed Verdict.*

Those grounds were argued on the motion for non-suit, and I won't take any further time.

I would like to mention as a further ground, and as further authority, the case of *Cleary vs. Meyer Brothers*, 114 Law 120, a Court of Errors and Appeals decision, and on the basis of that authority make my motion on the ground that the evidence now before the Court would be insufficient to sustain a verdict for the plaintiff if the jury should return such a verdict. 10

(Discussion.)

The Court: Your motion for a direction will be denied, and I will allow you an exception. 20

Mr. Fryling: May I have an exception?

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(Adjourned to March 31, 1941, at 10 A. M.)

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Paterson, N. J., March 31, 1941. 30

(Trial of the Cause continued at 10 A. M.)

(Mr. Fryling summed up the case to the jury on behalf of the defendant.)

(Mr. Duffy summed up the case to the jury on behalf of the plaintiffs.)

(The Court charged the jury as follows):

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**Charge to the Jury.**

WOLBER, J.

10 Ladies and gentlemen of the jury, in this case we have two plaintiffs, James Rizio, Junior, who sues by his father, James Rizio, Senior, as his next friend, and then James Rizio, Senior, the father sues in his own right. Of course, the rights of James Rizio, Senior, are based upon and derive from any rights that James Rizio, the son, would have. There is one defendant, the Public Service Electric and Gas Company.

20 Now, the boy and his father allege that on April 10, 1939, the Public Service Electric and Gas Company was the owner of an automobile that was being driven by its employe, John K. Russell; that that automobile was being driven in an easterly direction on Twentieth Avenue in the City of Paterson; that Russell, as he approached the intersection of Dover Street and Twentieth Avenue, operated the automobile in a careless and negligent manner, as a result of which it ran into the boy, James Rizio, Junior, who they say was lawfully on the highway at the intersection of the two streets, striking him with such force and violence as to severely injure him. The father and son further allege that as a result of this accident young Rizio underwent great pain and suffering; that he was unable to attend to his daily tasks and duties; that he was rendered sick, sore, lame, and disordered, and they say that he will be in that condition in the future, and they ask, as a result of the negligence of the defendant, which I will call the Public Service throughout my charge, and of course you know that means the sole defendant in this case, the Public Service Electric and Gas Company—they ask at your

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*Charge to the Jury.*

hands a verdict in money damages against the Public Service.

The father, as I told you, derives any rights which he has through his son, and he joins in these allegations and says that as a result of the negligence of the defendant he, the father, was obliged to expend moneys for hospital and doctor bills in an effort to cure his son of the injuries that he sustained, and he says that he will be obliged to do so in the future, in that he has and will be deprived of the services of the boy. For that reason the father asks a verdict at your hands against the defendant, the Public Service.

10

Now, the Public Service, in answer to those allegations, while admitting that they owned the car and that Mr. Russell was operating the car as their employe, denies the other allegations contained in the claims of the father and son, and they set up two separate defenses; one being that the negligence, contributory negligence, of Rizio was the cause of the accident and the injuries of which he and his father complain; and they set up a second separate defense in which they say that the sole and proximate cause of the accident was James Rizio Junior's own negligence. And on those issues this case has been tried.

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As I told you when you came in for service, the Court in these cases is the sole judge of the law and you ladies and gentlemen are the sole judges of the facts. You are to decide the credibility of the witnesses, where there is any contradictory testimony, and in so doing you naturally take into consideration the interest and relationship of the litigants and those who may have been called as witnesses, their general demeanor and actions on the witness-stand, and the impressions that they created in your minds. You determine the

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*Charge to the Jury.*

facts from the evidence as you heard it, but you apply the rules of law as the Court gives them to you.

10 You are not to take into consideration any statements that the Court or counsel may have made in reference to any of the testimony which conflicts with your own recollections and understanding of the facts, but you are to rely entirely on your own recollections as to what the evidence and the testimony are. Your own recollections are what are to control you in your deliberations.

Of course, it is almost needless to say that you should not be influenced in any way by sympathy or prejudice.

20 These two plaintiffs have the burden of proving that the accident of which they complain was caused by negligence before they can recover verdicts, and before they can recover verdicts against the defendant they must have satisfied you by a preponderance of the evidence that the defendant, through its employe, Russell, was guilty of negligence which proximately caused the injuries to this boy.

30 Now, what is negligence in law? Negligence is the failure to observe for the protection of another that degree of care, precaution, and vigilance which the circumstances justly demand, namely, reasonable care.

40 Reasonable care is such care as a reasonable person exercises in view of all the circumstances presented to him, such care as an ordinarily prudent person would exercise under the conditions at the time he is called upon to act. Where by reason of such failure such other person suffers injury or damage, the negligence must be the natural and proximate cause of the injury or damage.

*Charge to the Jury.*

Now, what is natural and proximate cause? Natural and proximate cause is that cause which naturally and probably led to and which might have been expected to produce the result, namely, the efficient cause.

Now, as I said, the defendant in this case contends that the accident was caused by young Rizio's own negligence and that he was chargeable with contributory negligence. The rule is that a person is charged, ordinarily, with the exercise of ordinary care for his own safety; he must use due care to protect himself, and the law says if he fails to exercise that care and it in any way contributes to the happening of an accident, then there can be no recovery. 10

The burden is upon the defendant to establish a defense of contributory negligence. It is a meeting on the part of the defendant of the issues presented by the plaintiff by saying that regardless of whether the defendant was negligent, the plaintiff was chargeable with contributory negligence. If that is sustained by the greater weight of the evidence, under the rules of law as I have given them to you, it would be a bar to both plaintiffs' recovery, regardless of whether the defendant's servant, Russell, was guilty of negligence or not. 20 30

Now, in this case we have a boy who was ten years of age at the time of the accident. He was old enough to be capable of contributory negligence, but the care required of him is that which is usually required and exercised by persons of similar age, judgment, and experience. An infant crossing a street is not required as a matter of law to exercise the same degree of care to avoid injury as is required of adults under similar circumstances. The degree of care to be exercised by 40

*Charge to the Jury.*

a child capable of negligence is such as it would be reasonable to expect of persons of similar age, judgment, and experience. Whether that degree of care has been exercised by the child is a question for you, ladies and gentlemen, to decide in this case.

10 There can be no recovery when the child suddenly puts himself in a dangerous place, where there is no reason to expect him and too late for the danger to be averted by the person inflicting the injury.

Now, let us see what the situation is in this case. The testimony is undisputed that Dover Street, running north and south, and Twentieth Avenue, running east and west, make what we call a T intersection. Our Legislature has passed  
20 certain Acts which regulate the rights and duties of users of our highways, whether they are pedestrians or whether they are operators of motor vehicles. For instance, in our Traffic Act the Legislature defines an intersection as follows: Intersections means the area embraced within the prolongation of the lateral curb-lines, or if none, the lateral boundary lines of the two or more highways which join one another at an angle, whether or not one such highway crosses another.

30 The Legislature in its wisdom has also described a crosswalk to mean that portion of the roadway ordinarily included within the prolongation of curb and property lines at street intersections, or that portion of a roadway clearly indicated for pedestrian crossing by lines marked on the surface of the roadway.

Of course, there is testimony in this case that there was no marking of any crosswalk on the surface of the highway.  
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*Charge to the Jury.*

The Legislature, further, has made provision with respect to the duty of pedestrians and motor vehicle operators in connection with the use of crosswalks by pedestrians. One provision is that the driver of a vehicle shall yield the right-of-way to a pedestrian crossing the roadway within a marked crosswalk, or within an unmarked sidewalk at the end of a block. 10

There is also a provision that at all intersections where traffic is not controlled and directed either by a police officer or a traffic signal, no pedestrian shall cross the highway other than at right-angles to the curb, and when crossing at a point other than a designated crosswalk shall yield the right-of-way to all vehicles on the highway.

On the question of speed the Legislature has said this, among other things: A person who drives a vehicle on the highway carelessly and heedlessly, in wanton or wilfull disregard of the rights or safety of others, or without due caution and circumspection, and at a rate of speed or in a manner so as to endanger or be likely to endanger a person or property, shall be guilty of reckless driving, and has said that subject to that provision which I have just read it shall be *prima facie* lawful for the driver of a vehicle to drive it at a speed not exceeding the following: Fifteen miles an hour when approaching within fifty feet and in traversing an intersection of highways when the driver's view is obstructed. A driver's view shall be deemed to be obstructed when at any time during the last fifty feet of his approach to the intersection he does not have a clear and interrupted view of the intersection and of traffic upon all of the highways entering the intersection 20 30 40

*Charge to the Jury.*

for a distance of two hundred feet from the intersection.

Then the Legislature, in the same section, says that in any case where any such speed would be unsafe it would be unlawful.

10 I charge you, however, that notwithstanding these provisions of the statute, that the mere violation of such a statutory duty is not in itself conclusive evidence of negligence. But it is evidence of negligence. It is evidence from which you may infer that the violator of the rule failed to use reasonable care for the safety and protection of others using the highway; it is evidence which you should consider, together with all other circumstances of the case, in determining the question of negligence.

20 Now, there is contradictory testimony in this case. I charge you that statements of witnesses who appeared to testify in this trial are admissible to contradict and discredit their testimony. I also charge you that it is not unlawful, unethical, or improper for the defendant in this case to have had its employes interview witnesses to the accident to procure their versions of the accident and reduce same to writing over the signature of those witnesses.

30 I also charge you that we have a rule in the division of evidence of our law which comes from an old Latin maxim, which, freely translated into English, is in these words: False in one, false in all. I charge you that that rule is not a mandatory rule of evidence. It is merely a permissible inference which a jury may or may not draw when convinced that a deliberate attempt has been made to mislead them in some material point.

40 If you determine that any of the witnesses in this case have not been telling the truth, you may

*Charge to the Jury.*

disregard all of that witness's testimony, or you may accept that which you believe to be true and disregard that which you believe to be untrue. Where a witness has knowingly sworn falsely to any material fact, you will be justified in disregarding his entire testimony. But you do not have to disregard it, and may give it such credit as you think it deserves. It is the credibility of the evidence which determines the weight, and not necessarily the number of witnesses testifying for one or the other side. 10

Now, ladies and gentlemen, let me briefly refer to the testimony that has been given in this case. You bear in mind that if my comment on the testimony doesn't square with your recollection, you disregard what I say and rely upon your recollection alone, as I have already charged you. 20

The accident occurred on April 10, 1939, I already referred to the character of the intersection. Plaintiffs offered testimony to show that James Rizio, who was about ten years old, was playing with some other boy named Michael Maloney, on the south sidewalk on Twentieth Avenue. There was a boy named Billy Winterberg on the other side of Twentieth Avenue, west of Dover Street, with whom they had been playing or whom they were making an effort to reach or get to. Winterberg was at what I think would be the northeast corner of the intersection of Martin Street and Twentieth Avenue. Martin Street, unlike Dover Street, dissects and goes across Twentieth Avenue, as I recall. The Rizio boy said—and there was other testimony—that there was a parked car, at least one—some witnesses testified to three parked cars—in and about that intersection of Dover Street and Twentieth Avenue, on the southerly side of Twentieth 30 40

*Charge to the Jury.*

Avenue. There was conflicting testimony, as I recall, with respect to whether or not that car nearest the westerly crosswalk, we will say, of Dover Street on Twentieth Avenue was parked the right way or the wrong way. If it were the right way, it would be facing east; if it were the wrong way, it would be facing west. Young Rizio testified that he stopped, that they had been running on the south sidewalk of Twentieth Avenue, but he says also that he was hiding, I think he used the word hiding, from Winterberg on the other side of the street so he wouldn't see him. But the boy testified that he was on the intersection or on the crosswalk as he stepped out from behind or in front of that car parked nearest to where the crosswalk would be, it not being marked. He said he made an observation to the left and made an observation to the right, and that he saw a truck, a big truck, coming in a westerly direction, that that truck passed. Then the boy said he was about in the middle of Twentieth Avenue when he was struck. There is a great discrepancy as to which side of the automobile driven by Mr. Russell struck the boy. You remember that testimony. There was testimony he was struck on the right side, and there was testimony he was struck on the left side. There is also a great variance as to the speed at which Mr. Russell was traveling. Russell himself said he was traveling twenty to twenty-five miles an hour. Young Winterberg testified to some ten feet of skid-marks, if you recall. There was testimony as to a higher rate of speed. At least one witness for the plaintiff, as I recall, testified to thirty miles an hour. There is a discrepancy or a difference as to how far the car driven by Mr. Russell was from the body of the boy as it lay

*Charge to the Jury.*

on the highway. I do recall distinctly Mr. Russell testified that he had such control of his car that he stopped it within a foot after he struck the boy. And then there is testimony that the boy's body was further away than twelve feet from the stopped car.

Of course, ladies and gentlemen of the jury, you have heard all the testimony, and you must consider it in arriving at your determination of whether or not the defendant was guilty of negligence in this case, under the instructions that I have given to you. 10

If you come to the conclusion that the defendant was negligent, under the rules of law that I have given to you, then you come to the question of damages, which you do not and should not consider until you first find that the defendant, through its servant Russell, was guilty of negligence. 20

You will not rely upon the opinion of counsel as to the amount for which in his opinion the damages should be given, but you will rely on the rule on damages which I shall now give you.

If you come to the conclusion that this child is entitled to a verdict, then it would be entitled to compensation in money damages, in so far as money can compensate him, for the injuries which he has sustained, for the pain and suffering which he has undergone, and may or will hereafter suffer, and for the effect upon his health and mind, according to its duration, degree, and permanency, taking into account, of course, the entire charge that I have given to you. 30

As to the damages to the father: If he is entitled to a verdict, he would be entitled to compensation for the loss of the services of the child. He will also be entitled to the expenses which 40

*Charge to the Jury.*

he has incurred or may reasonably hereafter incur in the cure and treatment of the child. Your verdict, if in favor of the plaintiff child, must compensate both the child and its father.

10 Now let us examine the testimony that has been offered in the case with respect to the character and the extent of the injuries to the boy first and then the out-of-pocket expenses to which the father was put.

20 The accident happened on April 10, 1939. The boy was taken to the Paterson General Hospital. Dr. Clay examined him. The doctor found a laceration of the left ear, a blood clot under the skin, which he called a hematoma, of another portion of his body, as I recall. The doctor said there was bleeding from the left ear, and he said there were fractures of the skull. The doctor said the boy's eyes were all right at the time of his admission to the hospital and were so until April 15, 1939, when they observed a paralysis of an eye muscle and a double vision. The boy left the hospital on April 30, 1939, twenty days after he was admitted. The doctor, Dr. Clay, as I recall, testified that the double vision and paralysis had cleared up fifty per cent., and the boy was discharged from the hospital.

30 Dr. Warren was produced as a witness on behalf of the plaintiff. He testified with respect to the taking of X-ray pictures, which are in evidence and which will go into the jury-room with you. He said that these pictures show three suture fractures of the skull, suture fractures being the enlargement of the separation of the parts of the human skull, which are more marked in infants or children than they would be in an adult, and also one linear fracture. Dr. Warren said, as I recall  
40 his testimony, that the fractures would knit again.

*Charge to the Jury.*

Dr. Sanfacon, an eye specialist, was produced on behalf of the plaintiff, and he testified he saw the boy the first time on July 29, 1939, which would be a little over three months after the accident. He said the last time he saw the boy was last March, this year, 1941, on March 21st. He said that the paralysis of the left eye muscle and the double vision were now gone. I recall his language. He says, "completely improved." The boy had testified that even today, when he went to the movies or if he read for fifteen minutes, he had a burn in the eyes, but Dr. Sanfacon said that his present condition is not due to the accident. He said that the aching was not due to the accident.

10

Now, from the standpoint of the father, he had a bill of Dr. Clay for \$85, a bill of Dr. Sanfacon for \$10, and a bill of the Paterson General Hospital, which counsel agreed to, for \$122, or a total of \$217.

20

So, ladies and gentlemen of the jury, after I refer to the requests to charge which have been given to me on behalf of both parties, I am going to leave this case in your hands.

I am asked to charge in certain particulars on behalf of the plaintiff. I charged, I think, the first, second, and third. I decline to charge the fourth.

30

On behalf of the defendant I think I have charged the two requests submitted to me.

Mr. Lippman, may I ask you to swear the officers who are to attend the jury?

(Two court attendants sworn by the clerk.)

40

*Defendant's Exceptions*

10 The Court: So, ladies and gentlemen of the jury, before you go to the jury-room, if you come to the conclusion that under my charge these two plaintiffs are entitled to verdicts against the defendant, you shall bring in two verdicts, two separate verdicts, one for the boy and one for his father, in a lump sum in dollars, in favor of each of them and against the defendant corporation.

If, on the other hand, you come to the conclusion that the Public Service is entitled to your verdict, it shall be a verdict of no cause of action, in favor of the Public Service and against both the father and the child.

With those instructions I ask you now to retire to the jury-room and commence your deliberations.

20 (The jury retired to consider of their verdict.)

## DEFENDANT'S EXCEPTIONS.

30 Mr. Fryling: I would like to take an exception on behalf of the defendant to all that part of the charge pertaining to the provisions of the Traffic Act concerning the intersection and crosswalk, and that part wherein the Court recited that the Traffic Act has defined an intersection and described a crosswalk, and wherein the Court recited that the Legislature has further made provision with respect to the duty of pedestrians and motor vehicle operators as to the use of the crosswalk, that the driver of the motor vehicle approaching the crosswalk shall yield the right-of-way to a pedestrian crossing the crosswalk.

40 I would also like to ask an exception as to that part of the charge covering the provisions of the Traffic Act respecting speed and defining the area of speed.

*Plaintiffs' Requests to Charge.*

## PLAINTIFFS' REQUESTS TO CHARGE.

1. The duty of observation required from children may differ in extent and degree from that required by an adult. Judgment, which a jury might find lacking in prudence, if formed by a person of mature years, might perhaps be found not to be lacking in prudence if formed by a child. 10

2. The driver of a vehicle shall yield the right of way to a pedestrian crossing the roadway within a marked crosswalk or within an unmarked sidewalk at the end of the block except at intersections where the movement of traffic is being regulated by police officers or traffic control signals. 20

3. It is unlawful for a driver of a vehicle to operate the said vehicle at a speed exceeding fifteen miles an hour when approaching within fifty feet and in traversing an intersection of highways, when the driver's view is obstructed. A driver's view shall be deemed to be obstructed when, at any time during the last fifty feet of his approach to the intersection, he does not have a clear and uninterrupted view of the intersection and of traffic upon all the highways entering the intersection, for a distance of two hundred feet from the intersection. 30

4. It shall be unlawful for a driver of a vehicle to drive at a speed exceeding twenty (20) miles per hour in a residential district. 40

*Defendant's Requests to Charge.*

## DEFENDANT'S REQUESTS TO CHARGE.

1. If you find that any witness in this case has wilfully testified falsely as to any material fact involved in the case, then you are entitled to disregard all of the testimony of that witness.

10

2. It is not unlawful, unethical, or improper for the defendant in this case to have had its employes interview witnesses to the accident to procure their versions of the accident and to reduce the same to writing, over the signatures of those witnesses.

20

(The jury returned into court in the presence of the Court, Mr. Fryling, and Mr. Sproviere.)

The Court: Ladies and gentlemen of the jury, I have been informed by the court attendant that you wish to put a question to the Court.

The Forelady: That is right, your Honor.

The Court: Do you wish to do it, Madam Forelady?

30

The Forelady: Well, the only question in mind, if we do favor in the boy's favor, that is, any large amount of money, will the father have any rights to it or will the boy when he gets of age have the rights to it?

The Court: Well, of course, I instructed you that if you should find for the plaintiff you should bring in verdicts for the two of them, for the father and the son, in separate amounts. Now, as to what becomes of that, that is not your concern in this case, don't you see? You do it on my instructions. If you find, as I said, ladies and

40

*Case.*

gentlemen of the jury, for the plaintiffs, then it shall be separate verdicts in lump sums in favor of the boy and his father against the defendant corporation. If, on the other hand, I also said, you find for the defendant corporation, it shall be a verdict of no cause of action against both plaintiffs.

10

The Forelady: I see, your Honor.

The Court: You must follow the instructions which the Court gave you on that.

Juror Number Ten: Your Honor, then there is no control as far as the money is concerned?

The Court: You have nothing to do with that. You limit yourselves to my instructions to you. As to what becomes of any money or anything else is no concern of yours.

The Juror: Thank you.

20

The Court: Is that all you wish to know?

The Forelady: That is all, your Honor.

The Court: You may now retire to the jury-room to continue your deliberations.

(The jury again retired.)

30

40

**Postea.**

(Filed April 1, 1941.)

NEW JERSEY SUPREME COURT,  
PASSAIC COUNTY.

10

JAMES RIZIO, JR., an infant, by  
his next friend, James Rizio,  
Sr., and JAMES RIZIO, SR., indi-  
vidually,

Plaintiffs,

*vs.*

20

PUBLIC SERVICE ELECTRIC & GAS  
COMPANY, a corporation of the  
State of New Jersey,  
Defendant.

Action at Law.

This case was tried before Honorable Joseph G. Wolber, Judge, and a jury at the Passaic Circuit, on March 25th, 27th and 31st, 1941.

30

The jury rendered a general verdict against the defendants, Public Service Electric and Gas Company, and in favor of the plaintiff, James Rizio, Jr., an infant, by his next friend, James Rizio, Sr., for five thousand (\$5,000) Dollars, and a general verdict against the defendant, Public Service Electric & Gas Company, and in favor of the plaintiff, James Rizio, Sr., individually, for One Thousand (\$1,000) Dollars.

JOSEPH G. WOLBER,  
Judge.

40

**Judgment, Final.**

(Filed April 1, 1941.)

NEW JERSEY SUPREME COURT,  
PASSAIC COUNTY.

JAMES RIZIO, JR., an infant, by  
his next friend, James Rizio,  
Sr., and JAMES RIZIO, SR., indi-  
vidually,

Plaintiffs,

*vs.*

PUBLIC SERVICE ELECTRIC & GAS  
COMPANY, a corporation of the  
State of New Jersey,

Defendant.

10

20

This case was tried before Honorable Joseph G. Wolber, Judge, and a jury at the Passaic Circuit, on March 25th, 27th and 31st, 1941.

The jury rendered a general verdict against the defendant, Public Service Electric and Gas Company, and in favor of the plaintiff, James Rizio, Jr., an infant, by his next friend, James Rizio, Sr., for five thousand (\$5,000) Dollars, and a general verdict against the defendant, Public Service Electric & Gas Company, and in favor of the plaintiff, James Rizio, Sr., individually, for One Thousand (\$1,000) Dollars.

30

Subsequently to the rendition of said verdict a rule to show cause why the verdict should not be set aside and a new trial granted was allowed to said defendant, which said rule was argued before Honorable Joseph G. Wolber, Circuit Court Judge, before whom the case was tried, and the

40

*Judgment, Final.*

10 Court having ordered that if the plaintiff, James Rizio, Jr., an infant by his next friend, James Rizio, Sr., would consent to reduce his verdict as against the defendant to twenty-five hundred dollars, and if the plaintiff James Rizio, Sr., individually, would consent to reduce his verdict as against the defendant to five hundred dollars, said rule to show cause would be discharged, otherwise it would be made absolute, and the plaintiffs having consented to accept said reduced verdicts and said rule to show cause having been discharged,

20 Whereupon it is adjudged that the plaintiff James Rizio, Jr., an infant, by his next friend James Rizio, Sr., do recover of the said defendant Public Service Electric & Gas Company, a corporation of the State of New Jersey the sum of twenty-five hundred dollars damages, and that the plaintiff James Rizio, Sr., individually, do recover of the said defendant Public Service Electric & Gas Company, a corporation of the State of New Jersey the sum of five hundred dollars damages together with their costs which have been taxed at the sum of sixty-five dollars and ninety-four cents making in the whole the sum of three thousand sixty-five dollars and ninety-four cents.

30 Damages \$2500.00 J. R. Jr.  
 " 500.00 J. R. Sr.  
 Ind.  


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 \$3000.00  
 Costs 65.94  


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 \$3065.94

Judgment entered and signed April 1, 1941.

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THOMAS J. BROGAN,  
 Chief Justice.

**Rule to Show Cause.**

(Filed April 4, 1941.)

NEW JERSEY SUPREME COURT,  
PASSAIC COUNTY.

JAMES RIZIO, JR., an infant, by  
his next friend, James Rizio,  
Sr., and JAMES RIZIO, SR., indi-  
vidually,

Plaintiffs,

*vs.*

PUBLIC SERVICE ELECTRIC AND GAS  
COMPANY, a corporation of the  
State of New Jersey,  
Defendant.

10

Action at Law.

20

Application having been made within six days  
after the rendering of the verdicts in the above  
entitled cause,—

IT IS, on this 1st day of April, 1941, ORDERED  
that the plaintiffs show cause before Honorable  
Joseph G. Wolber, Circuit Court Judge to whom  
the above entitled cause was referred for trial,  
at the Passaic County Court House, in the City  
of Paterson, New Jersey, on Friday, the 25th day  
of April, 1941, at 10 o'clock in the forenoon, why  
the verdicts heretofore rendered in the above  
entitled cause should not be set aside and a new  
trial granted defendant on the following ground:

30

1. Because the damages awarded by the jury are excessive.

40

*Rule to Show Cause.*

And it is further ordered that all points raised by each and all of the exceptions taken at the trial of this cause be, and they hereby are expressly reserved for the purpose of appeal.

And it is further ordered that pending the determination of the rule execution be stayed.

10 Let the above rule be entered in the minutes.

JOSEPH G. WOLBER,  
C. C. Judge.

On motion of

HENRY H. FRYLING,  
Attorney of Defendant.

20 Service of a copy of the within rule to show cause is hereby acknowledged this 2nd day of April, 1941.

VINCENT C. DUFFY,  
Attorney of Plaintiffs.

30

40

**Rule.**

(Filed June 10, 1941.)

NEW JERSEY SUPREME COURT,  
PASSAIC COUNTY.

<p>JAMES RIZIO, JR., an infant, by his next friend, James Rizio, Sr., and JAMES RIZIO, SR., indi- vidually,</p> <p style="text-align: center;">Plaintiffs,</p> <p style="text-align: center;"><i>vs.</i></p> <p>PUBLIC SERVICE ELECTRIC AND GAS COMPANY, a corporation of the State of New Jersey,</p> <p style="text-align: center;">Defendant.</p>	<p style="font-size: 4em;">}</p> <p>Action at Law. On Rule to Show Cause.</p>	<p>10</p> <p>20</p>
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The rule heretofore granted in the above en-  
titled cause directing the plaintiffs to show cause  
why the verdicts heretofore rendered in the said  
cause should not be set aside and for nothing  
holden, on the sole ground that the verdicts ren-  
dered were excessive, having been duly argued by  
the respective counsel of the plaintiffs and de-  
fendant, and the Court having considered the  
same,

IT IS, on this 9th day of June, 1941, ORDERED  
that the said rule to show cause be made absolute,  
and that the verdicts heretofore rendered in the  
said cause, and any judgments entered thereon,  
be set aside and for nothing holden, unless the  
plaintiffs shall within twenty days from June 6,  
1941 cause to be entered in the minutes of this  
Court a rule consenting to a reduction of the

*Rule.*

10 verdicts in the said cause, and the judgments entered thereon to the sum of Two Thousand Five Hundred Dollars (\$2,500.00) in favor of the plaintiff, James Rizio, Jr., an infant, by his next friend James Rizio, Sr., and to the sum of Five Hundred Dollars (\$500.00) in favor of the plaintiff, James Rizio, Sr., individually.

Let this rule be entered in the minutes.

JOSEPH G. WOLBER,  
C. C. Judge.

On motion of

HENRY H. FRYLING,  
Attorney of Defendant.

20

Service of a copy of the within Rule is hereby acknowledged this 9th day of June, 1941.

VINCENT C. DUFFY,  
Attorney of Plaintiffs.

30

40

**Consent Order.**

(Filed June 17, 1941.)

NEW JERSEY SUPREME COURT,  
PASSAIC COUNTY.

---

JAMES RIZIO, JR., an infant, by  
his next friend, James Rizio,  
Sr., and JAMES RIZIO, SR., indi-  
vidually,

Plaintiffs,

*vs.*

PUBLIC SERVICE ELECTRIC & GAS  
COMPANY, a corporation of the  
State of New Jersey,

Defendant.

10

20

This case was tried before Honorable Joseph G. Wolber, Judge, and a jury at the Passaic Circuit, on March 25th, 27th and 31st, 1941. The jury having rendered a general verdict against the defendant, Public Service Electric and Gas Company, and in favor of the plaintiff, James Rizio, Jr., an infant, by his next friend, James Rizio, Sr., for five thousand (\$5,000) Dollars, and a general verdict against the defendant, Public Service Electric and Gas Company, and in favor of the plaintiff, James Rizio, Sr., individually, for One Thousand (\$1,000) Dollars;

30

And the defendant having made application for a Rule to Show Cause, on the 1st day of April, 1941, why the verdicts rendered in the above entitled cause should not be set aside and a new

40

*Consent Order.*

trial granted the defendant on the ground that the damages awarded by the jury were excessive;

10 And the court having heard arguments of counsel on the said Rule to Show Cause, and after considering the arguments the court ruled that if the plaintiffs will formally accept the reduction in the verdict in favor of James Rizio, Jr., an infant, by his next friend, James Rizio, Sr., to the sum of Twenty-five (\$2500) Hundred Dollars, and a reduction of the verdict in favor of James Rizio, Sr., individually, to the sum of Five Hundred (\$500) Dollars, the Rule to Show Cause will be discharged, otherwise, the Rule to Show Cause will be made absolute on all issues, and the consent of the plaintiffs to accept said reduction appearing hereunto;

20 It is, on this 10th day of June, 1941, ORDERED that the verdict be and the same is hereby reduced to read as follows:

\$2,500 for James Rizio, Jr., an infant, by his next friend, James Rizio, Sr., and \$500 for James Rizio, Sr., individually.

JOSEPH G. WOLBER,  
Judge.

30

I hereby consent to the acceptance of the said reduction and the entry of the said Order.

VINCENT C. DUFFY,  
Attorney for Plaintiffs.

40

### Grounds of Appeal.

(Filed June , 1941.)

#### NEW JERSEY COURT OF ERRORS AND APPEALS.

JAMES RIZIO, JR., an infant, by  
his next friend, James Rizio,  
Sr., and JAMES RIZIO, SR., indi-  
vidually,

Plaintiffs-Appellees,

*vs.*

PUBLIC SERVICE ELECTRIC AND GAS  
COMPANY, a corporation of the  
State of New Jersey,  
Defendant-Appellant.

10

Action at Law.  
On Appeal From  
New Jersey  
Supreme Court,  
Passaic County.

20

*To: Vincent C. Duffy, Esq., Attorney of Plain-  
tiffs-Appellees:*

*Sir:*

TAKE NOTICE that the following are the grounds  
of appeal which the defendant-appellant will urge  
why the judgment heretofore rendered against it  
in the above entitled cause, should be reversed,  
set aside and for nothing holden:

30

1. Because the Court, although requested  
so to do by the attorney for the defendant at  
the close of the plaintiffs' case, refused to  
nonsuit the plaintiffs on the following  
grounds:

That the proofs did not show that the  
defendant was guilty of any negligence

40

*Grounds of Appeal.*

which was the proximate cause of the accident and the injuries complained of, and that the proofs show that the plaintiff, James Rizio, Jr., was guilty of contributory negligence.

10

2. Because the Court, although requested so to do by the attorney for the defendant, at the close of the whole case, refused to direct a verdict in favor of the defendant on the following grounds:

20

That the proofs did not show that the defendant was guilty of any negligence which was the proximate cause of the accident and the injuries complained of, and that the proofs show that the plaintiff, James Rizio, Jr., was guilty of contributory negligence.

Dated: June 19, 1941.

Yours truly,

HENRY H. FRYLING,  
Attorney of Defendant-Appellant.

30

Service of a copy of the within grounds of appeal is hereby acknowledged this 19th day of June, 1941.

VINCENT C. DUFFY,  
Attorney of Plaintiffs-Appellees.

40

**Exhibit D-1.**

In Re James Rizio Jr.

Case No. P.E. 3413 33417-3.

Master Michael Maloney.

Occupation Schoolboy.

Residence 254—20th Ave. Paterson Age 13  
years. 10

Nationality Italian American

Where Born U. S.

Date December 27, 1939 Time 3:00 P. M.

States to L. W. Busch at 254—20th Ave.,  
Paterson.

That on April 10, 1939 about 4 o'clock in the  
afternoon I was playing in front of my house with  
James Rizio. My house faces Dover St. which  
runs into 20th Ave. On our side of the street  
there were three automobiles parked at the curb  
facing east. We were standing in front of the first  
automobile. We were looking at a boy who was  
sitting in his wagon facing west on the opposite  
side of street. I and Rizio decided to chase him.  
A big truck passed in front of us. We then looked  
both ways up and down street and didn't see any-  
thing. The truck had just gone on. As soon as  
it did we started running—Rizio was in front and  
I was behind him. Rizio got about 2 or 3 feet  
away from the car where we were standing and  
toward the middle of the street when he was  
struck by the right front fender of an automobile  
that was going quite fast east on 20th Ave. I did  
not see this. 20 30

(Signed) MICHAEL MALONEY.

Witness 40

L. W. BUSCH

*Exhibit D-4.*

In Re James Rizio Jr.

Case No. P.E. 3413 33417/3

- 10 M. Michael Maloney Age 13 years.  
 automobile before it struck young Rizio I stopped  
 running in time to avoid being hit. The automomobile  
 stopped right away another car pulled up  
 and some man picked the Rizio boy up and took  
 him to the hospital. The Winterberg boy, who was  
 the one across the street, then went and told  
 Rizio's Mother. That is all I know about this  
 accident. I have read this and this is true.

MICHAEL MALONEY.

- 20 Witness L. W. BUSCH

**Exhibit D-4.**

M. JAMES A. CASPELL

- 30 Residence—167 20th Ave., Paterson, N. J.  
 Where Employed—W. P. A.  
 Occupation—W. P. A. Foreman.  
 Age—38 Years.  
 Nationality—Am.  
 Where Born—Paterson, N. J.

Date April 24/39 Time 12 noon.

- States to J. W. Haffer at N. J. Training School.  
 On Monday, April 10/1939 at about 4:05 P. M.  
 I was walking on the south sidewalk of 20th Ave.,  
 Paterson, N. J. My wife was walking with me.  
 40 The weather was clear and pavement dry.

*Exhibit D-4.*

As we walked along in a westerly direction talking and when about 75 feet east of Dover St. my attention was attracted by a sound of something being hit. I looked forward and noticed a small child rolling on pavement. This child was about 12 to 15 feet west of Dover St. when I first noticed the child. The child was rolling in front of an auto and was about 10 feet out from the south curb of 20th Ave. and the child rolled to about 20 to 25 feet east of west curb line of Dover St. and I ran to the child, the first one to reach him. He laid in a crouched position on his right side, facing Dover St. and about 10 feet out from south curb of 20th Ave.

10

Signed JAMES A. CASPELL.

20

—2—

The auto which boy had come into contact with, was stopped about 20 feet west of where the boy laid, or front end of Auto about on even line with west curb line of Dover St.

There was another auto at south curb facing east on 20th and east of Dover St. and which auto blocked my view of the contact of accident. I picked the boy up and after examination of the boy I felt he had no broken bones, but as he was bleeding in back of his head, felt he should get medical Attention, so an Auto passing was stopped and I carried boy into this Auto and another W. P. A. man from nearby field office went with me in Auto and we took the child to General hospital, where we left the child in care of the hospital physician and nurse.

30

40

*Exhibit D-5.*

I do not know any one who saw this accident outside of the man from W. P. A. field office. Due to Auto parked and being parked on south side of 20th Ave. facing

10

Signed JAMES A. CASPELL.

\_\_\_\_\_

—3—

20

east with its front end close to center line of Dover St. blocked both my view and my wifes view & prevented us from seeing how this accident happened or where the child came from or was going to. We were the only ones on this side of the street. The child was alone and no other children around.


I have readed above statement and find it true and correct.

Signed JAMES A. CASPELL.

\_\_\_\_\_

**Exhibit D-5.**

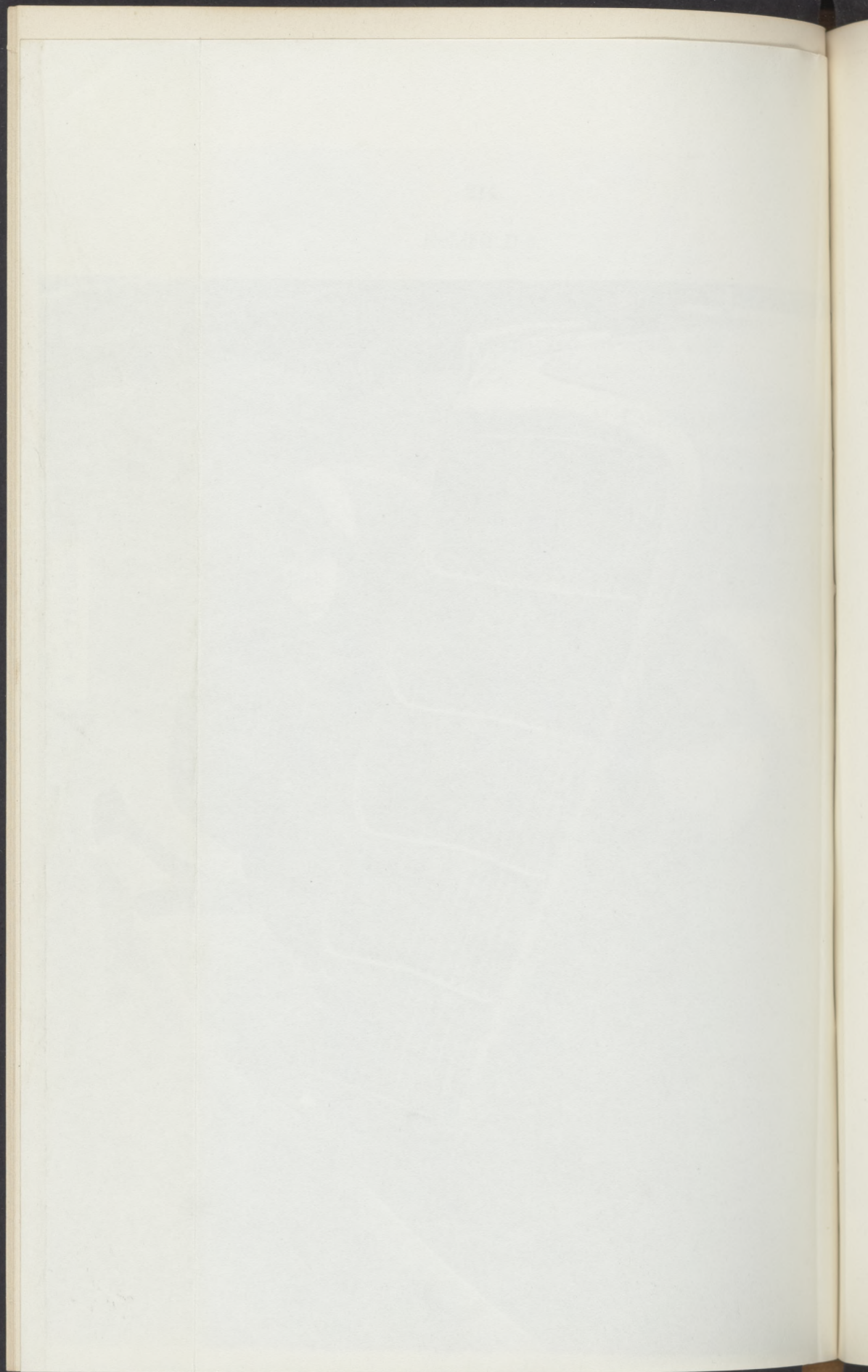
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**(Photograph)***(Opposite )*

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Exhibit D-5



215

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
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**Exhibit D-6.**  
**(Photograph)**

(*Opposite* )

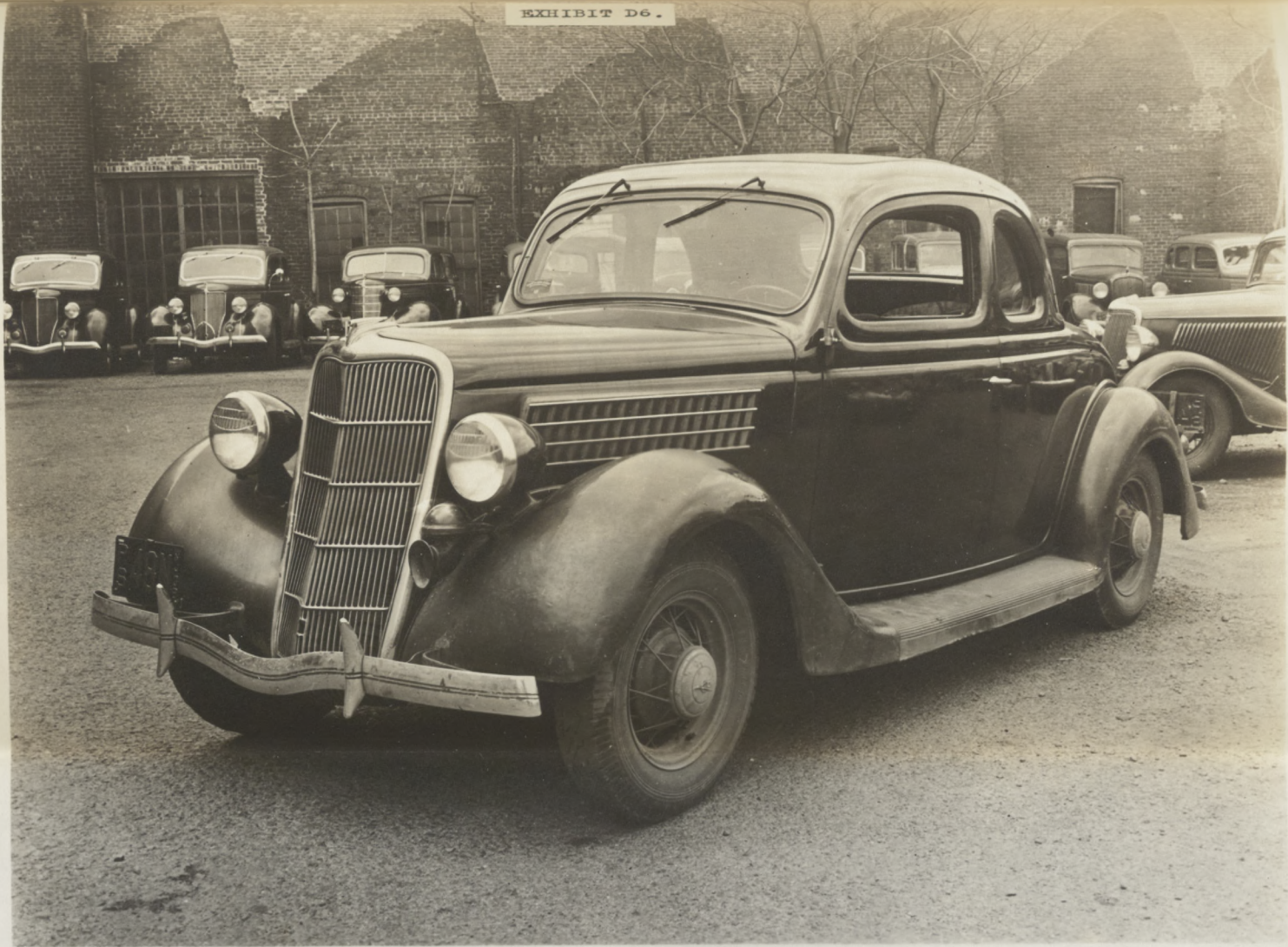
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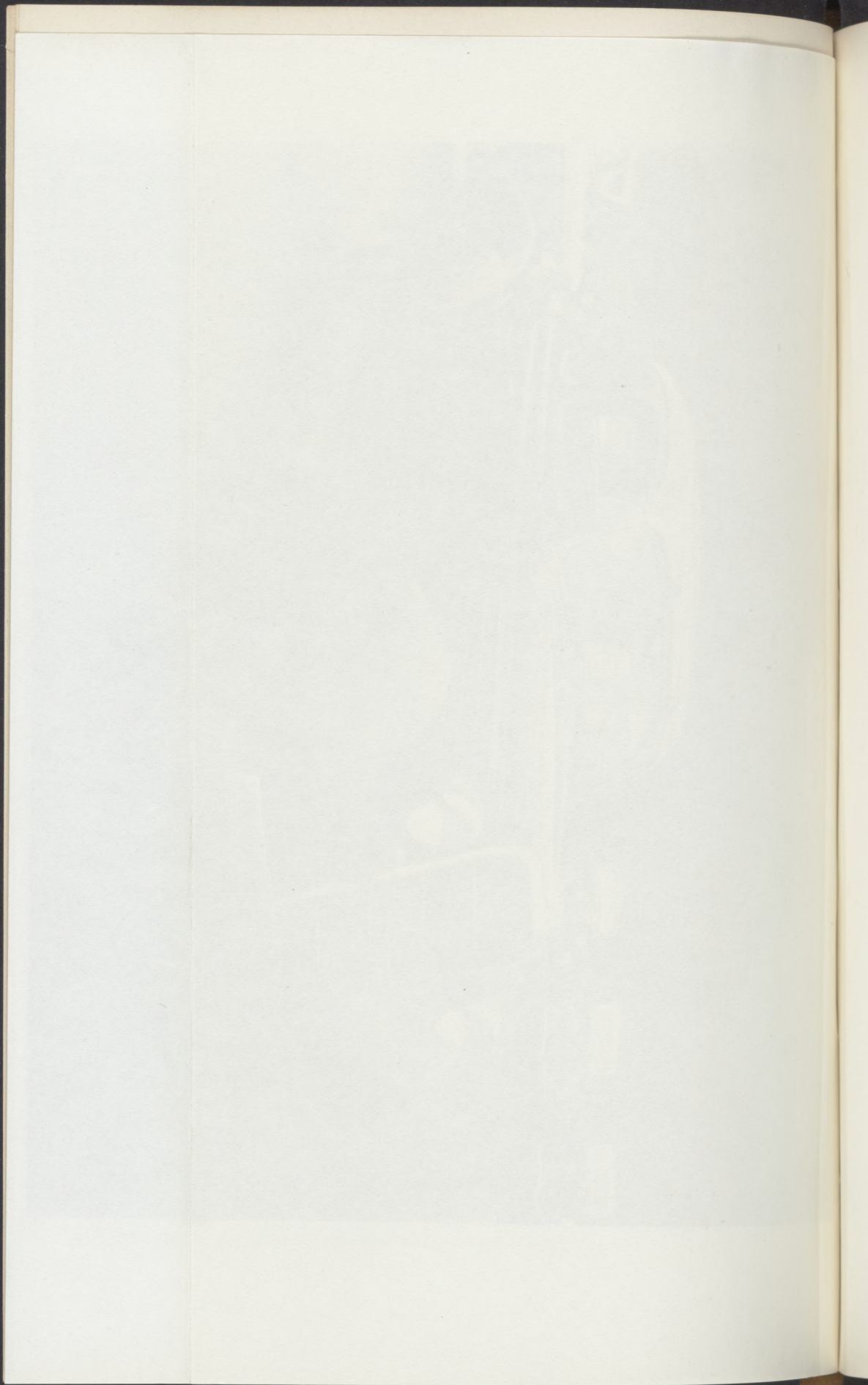
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EXHIBIT D-6.

EXHIBIT D6.





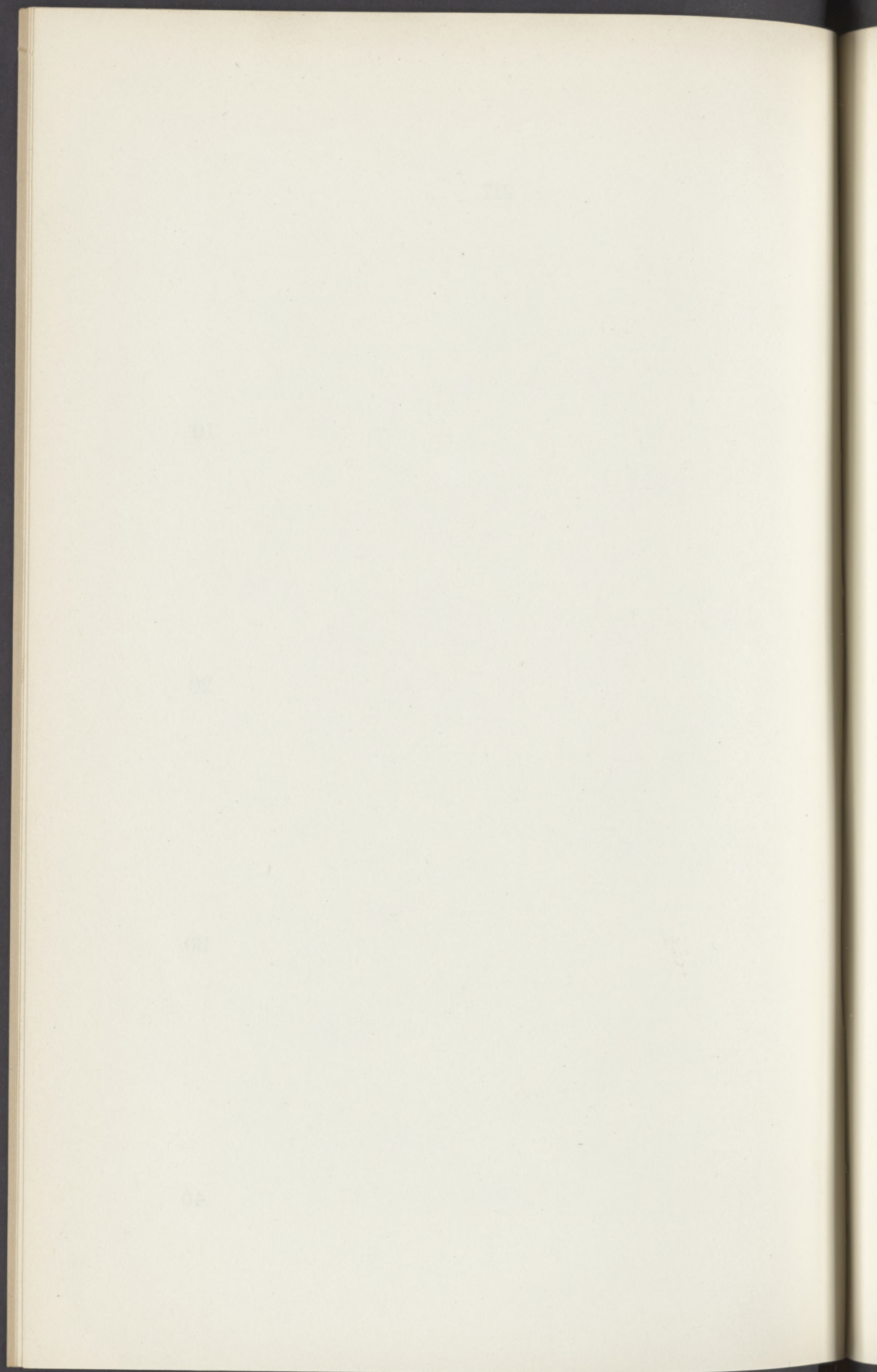
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**New Jersey Court of Errors and Appeals**

JAMES RIZIO, JR., an infant, by his next friend, James Rizio, Sr., and JAMES RIZIO, SR., individually,

Plaintiffs-Appellees,

*vs.*

PUBLIC SERVICE ELECTRIC AND GAS COMPANY, a corporation of the State of New Jersey,  
Defendant-Appellant.

Action at Law.

On Appeal from

New Jersey Supreme Court, Passaic County.

**BRIEF OF DEFENDANT-APPELLANT.**

**Statement of Facts.**

This appeal arises out of the trial of the above entitled matter on March 25, 27 and 31, 1941 in the Passaic Circuit of the Supreme Court before the Honorable Joseph G. Wolber, Circuit Court Judge, and a jury. At the conclusion of the trial, the jury returned its verdicts in favor of the plaintiff, James Rizio, Jr., by his next friend, in the sum of \$5,000, and in favor of the plaintiff James Rizio, Sr., individually, in the sum of \$1,000 against the defendant.

Thereafter, appellant obtained from the trial judge a rule to show cause why the verdicts should not be set aside and a new trial granted on the sole ground that the damages awarded by the jury were excessive (p. 203, Printed State of Case). Pursuant thereto, the verdict in favor of the infant plaintiff, James Rizio, Jr., by his next friend, was reduced to the sum of \$2,500 and the

verdict in favor of the plaintiff, James Rizio, Sr., was reduced to the sum of \$500, and on plaintiffs' filing their consent to such reductions, the rule to show cause was discharged (p. 207).

Under the rule to show cause, all of the exceptions taken at the trial were expressly reserved for the purpose of appeal, and were not argued (pp. 203-204).

The suit in this case arose out of an accident which occurred on Monday, April 10, 1939, at about four o'clock in the afternoon, when it was daylight, the weather was clear and the streets dry. The accident involved the infant plaintiff, James Rizio, Jr., a pedestrian, and a Ford coupé automobile, which at the time was owned by the appellant, Public Service Electric and Gas Company, and operated by its employee. The accident in question occurred in the City of Paterson, on Twentieth Avenue, which runs generally east and west. Appellant's automobile was going from west to east on Twentieth Avenue and the infant plaintiff was crossing Twentieth Avenue from the south side to the north side, at a point where Dover Street intersects, but does not cross Twentieth Avenue, and which, beginning at Twentieth Avenue, extends northwardly. Plaintiffs' proof was that the infant plaintiff was on the west crosswalk, at this "T" intersection.

A short block away from, and west of Dover Street, Martin Street also running north and south, intersects and crosses Twentieth Avenue and a short block away from, and east of Dover Street, Lewis Street, which runs north and south, also intersects and crosses Twentieth Avenue.

The infant plaintiff was ten years and ten months of age at the time of the accident, was a student in the sixth grade in one of Paterson's

public schools and was in all respects normal, considering his age and schooling. The undisputed proof is that he had been hiding with another boy in front of the most easterly of several cars, which were parked along the south curblin of Twentieth Avenue, and when appellant's automobile, in the act of passing these parked cars, had reached a point so that its front end was abreast of the rear end of that most easterly parked car, the infant plaintiff half trotted, or ran from his place of concealment, directly into the path of appellant's car, as a result of which he was struck and thrown to the pavement, sustaining injuries, in the nature and extent of which we are not interested or concerned on this appeal.

At the close of the plaintiffs' case, appellant moved for a non-suit, and at the close of the entire case, appellant moved for a directed verdict in its favor. The motion for a non-suit was as follows:

"Mr. Fryling: I respectfully move for a non-suit at this juncture on the ground that the proofs as they are now before the Court do not show that the defendant, through its servant, was guilty of any negligence which was the proximate cause of the accident and the injuries complained of;

On the second ground, your Honor, that the proofs as adduced by the plaintiff show that this accident resulted from the contributory negligence of the plaintiff himself, that is, the infant plaintiff, James Rizio.

(Discussion.)

The Court: The motion is denied.

Mr. Fryling: May I have an exception?

The Court: You may have an exception"  
(pp. 119-120).

Appellant's motion for a directed verdict in its favor was as follows:

“Mr Fryling: I respectfully move, your Honor, for a directed verdict in favor of the defendant, on the grounds that the proof as now before the Court shows no negligence, that is, negligence which was the proximate cause of the accident and injuries to the plaintiff;

On the further ground that the proof as now before the Court shows that the plaintiff was guilty of contributory negligence.

Those grounds were argued on the motion for non-suit, and I won't take any further time.”

“I would like to mention as a further ground, and as further authority, the case of *Cleary v. Meyer Brothers*, 114 Law 120, a Court of Errors and Appeals decision, and on the basis of that authority make my motion on the ground that the evidence now before the Court would be insufficient to sustain a verdict for the plaintiff if the jury should return such a verdict.

(Discussion.)

The Court: Your motion for a direction will be denied, and I will allow you an exception.

Mr. Fryling: May I have an exception?”  
(pp. 182-183).

The grounds of appeal are (pp. 209-210):

“1. Because the Court, although requested so to do by the attorney for the defendant at the close of the plaintiffs' case, refused to non-suit the plaintiffs on the following grounds:

That the proofs did not show that the defendant was guilty of any negligence which was the proximate cause of the accident and the injuries complained of, and that the proofs show that the plaintiff, James Rizio, Jr., was guilty of contributory negligence.

2. Because the Court, although requested so to do by the attorney for the defendant, at the close of the whole case, refused to direct a verdict in favor of the defendant on the following grounds:

That the proofs did not show that the defendant was guilty of any negligence which was the proximate cause of the accident and the injuries complained of, and that the proofs show that the plaintiff, James Rizio, Jr., was guilty of contributory negligence."

Since the same questions are involved in each of these two grounds of appeal, and since appellant's proof did not aid the plaintiffs' case appellant will argue them together throughout this brief, and under each of the points made herein.

### POINT I.

**The proofs at the close of the plaintiffs' direct case, and also at the end of the entire case, show that the infant plaintiff, James Rizio, Jr., was guilty of negligence which was the sole cause, or which at least contributed to the happening of the accident so as to bar any recovery by the plaintiffs in this suit.**

Plaintiffs' proof with respect to the happening of this accident consisted of the testimony of the infant plaintiff, James Rizio, Jr.; another infant, fourteen year old Michael Maloney; David Mornick; James A. Caspell; another infant, fourteen year old William Winterberg, and James Brooks, in addition to medical and lay testimony respecting the extent of the infant plaintiff's injuries.

According to the testimony of the infant plaintiff, James Rizio, Jr., he was ten years old and would be eleven years old during June, following the accident (p. 17, ll. 8-9), and was in the sixth grade (p. 17, l. 10) of School No. 15 in Paterson (p. 11, ll. 36-37). At the time of the accident, he

lived at 89 Martin Street, which was around the corner from where the accident happened (p. 17, ll. 13-14). He, with Michael Maloney, had been playing on Martin Street (p. 17, l. 32) to the south of Twentieth Avenue (p. 18, ll. 4-5), and passed through the back yards of Martin Street and Twentieth Avenue houses coming out to the sidewalk of Twentieth Avenue (p. 18, ll. 15-19; p. 19, ll. 25-26), and when they came out from between two houses to this sidewalk, they saw Billy Winterberg (p. 20, ll. 17-20) on the opposite side of Twentieth Avenue, at the corner of Martin Street and Twentieth Avenue (p. 18, ll. 33-36) which would be to their left as they faced across Twentieth Avenue. It does not appear when these two boys had first made up their minds, but at least by the time they came out to the sidewalk of Twentieth Avenue, they had decided "to get Billy Winterberg" (p. 18, ll. 23-30), or, in other words, they were going to chase Billy Winterberg and did not want him to see them approaching. They were sort of playing a game (p. 20, ll. 28-38).

From the point where the two boys came from between the buildings, they ran to their right, away from the corner where Billy Winterberg was, or eastwardly along the south sidewalk of Twentieth Avenue (p. 19, ll. 27-37, and p. 20, ll. 13-16) towards the parked car which they intended to hide behind so that Billy Winterberg could not see them as they crossed to his side of the street (p. 20, ll. 25-38). According to the infant plaintiff, both boys stopped running when they reached a position in front of the parked automobile (p. 21, ll. 11-20) where they stopped to look for cars traveling on Twentieth Avenue (p. 21, ll. 17-30). The boys, according to the infant plaintiff, were then three feet out from the gutter, in the street, "near the left headlight, in front of the left head-

light" of that parked automobile (p. 12, ll. 12-18) and about four feet in front of that parked car (p. 12, l. 32 to p. 13, l. 8). While in this position, the infant plaintiff looked to his left and saw no cars coming, and he then looked to his right and saw an old truck passing. The two boys waited for this truck, for about five seconds, and then the infant plaintiff started to cross Twentieth Avenue (p. 12, ll. 18-22, p. 21, ll. 17-39) without making another observation to his left (p. 21, l. 40).

The boys had remained in their position in front of this parked car during that five-second interval while they were waiting for the truck to pass, and as above indicated, the infant plaintiff started to cross the street without again making an observation to his left (p. 22, ll. 24-30, p. 23, ll. 6-19).

The infant plaintiff described his pace as he left his position in front of the parked automobile and started to cross Twentieth Avenue, on direct, as well as cross examination, as "half trot" (p. 15, ll. 14-17, p. 20, ll. 36-40). The infant plaintiff indicated that half trotting as he was, he reached the middle of the street when he was hit (p. 12, ll. 23-27), and he never saw the car that struck him (p. 22, ll. 31-32). In spite of the fact that he admittedly did not see the car, he testified as to his conclusion that the car must have been going pretty fast because he had not seen it (p. 22, ll. 34-39) and the conclusion that he was struck by the left side of the front end of the car, since he was almost in the middle of the street when he was struck (p. 23, ll. 20-33). At the time of this impact, according to this boy who half trotted across the street from his place of concealment, and who never saw the car that struck him, his playmate, Michael Maloney, had remained in his position of safety in front of the parked automobile (p. 24, ll. 14-24).

The plaintiff, James Rizio, Sr., the father of the infant plaintiff, was also called as a witness, but he did not testify as to the happening of the accident. On cross examination, however, he acknowledged that he and his family, including the infant plaintiff, had lived at the address on Martin Street, around the corner from the scene of this accident, for five years (p. 36, ll. 22-25), and that before the accident, the infant plaintiff had been properly instructed both at home and in school as to ordinary safety rules (p. 37, l. 37, to p. 38, l. 21). It might also be pointed out that throughout the case, there was every indication that the infant plaintiff was in all respects normal physically and mentally for a boy of his age and schooling.

Michael Maloney, who was fourteen years of age at the time of the trial, and in grade 8-B of public school, and who was the boy playing with the infant plaintiff at the time of this accident was also produced as a witness. In practically every respect his version of this accident, on his direct examination by plaintiffs' counsel, was the same as the infant plaintiff's. This witness, however, indicated that as they were concealing themselves in front of the parked car, they were from four to six feet away from it (p. 40, ll. 18-34, p. 41, ll. 20-21). He added to the plaintiffs' version of the accident, that there were three cars parked along the south side of Twentieth Avenue, and that he and the infant plaintiff had chosen the most easterly of those three parked cars to hide behind so that as they ran along Twentieth Avenue, they hid beyond the last of the parked cars that they came to (p. 44, ll. 11-30). This witness also added to the plaintiffs' version of the accident in that he described the position of the infant plaintiff and himself, as they were hiding in front of the parked car from Billy Winterberg, as crouching or "bent

over a little bit" (p. 44, l. 27, to p. 45, l. 12). This witness also described how the infant plaintiff started to half trot across the street and when he got about eight feet "there was a car all of a sudden" (p. 41, ll. 29-35); that this distance of eight feet took the infant plaintiff to about the middle of Twentieth Avenue (p. 46, ll. 23-26), and that at the instant when the infant plaintiff was struck, this witness was just ready to start across the street, but had not yet moved from his position in front of the parked car (p. 46, ll. 19-22). This witness also stated that he saw the car as it traveled the last eight feet before the impact and that the left side of the front end of the car struck the infant plaintiff (p. 47, ll. 10-31), and he too testified that the car "was going quite fast" (p. 47, ll. 35-39), but the form of his answer (ll. 37-39) would indicate that by "quite fast" he meant the speed at which other cars traveled.

On cross examination this witness was confronted with a written statement which he had signed in the presence of his parents and at the end of which he, in his own handwriting, had written "I have read this, and this is true" (p. 50, ll. 25-26; p. 51, ll. 12-19; and p. 54, ll. 3-13). This witness had at first denied having made or signed any statement and even after he acknowledged his having signed the same, he refused for a while to admit having given the statement (p. 48, l. 30, to p. 52, l. 39). Finally, after persistent questioning by counsel, and the court, the witness admitted having given the statement and he went further and conceded the truth of every material part of his written statement (pp. 53-58). This paper, which appears in the State of Case as Exhibit D-1 (pp. 211-212), over the signature of this witness, mentions that there were three automobiles parked at the curb, that they were standing in

front of the first one (apparently meaning the most easterly one), looking at a boy on the opposite side of the street; that he and the infant plaintiff decided to chase the boy; that a truck passed in front of them; that they then looked both ways and did not see anything; that after the truck passed they started running, the infant plaintiff in front and the witness in back; that the infant plaintiff got two or three feet away from the parked car, towards the middle of the street, when he was struck by the right front fender of the appellant's automobile, which was going quite fast; that the witness had not seen appellant's car before it struck the infant plaintiff and that it stopped right away. Though this document was not put in evidence on the plaintiffs' case, the witness Michael Maloney, on cross examination, ultimately admitted having made that statement, word for word (pp. 53-58) and had admitted that everything therein recited was the truth, excepting as to that part of the statement which recited that the observations were made after the truck had passed, instead of before the truck passed (p. 56, ll. 14-17 and p. 58, ll. 19-22).

The plaintiffs' next witness was David Mornick, a WPA worker who was near the scene of the accident and who saw the entire accident. He testified, on direct examination, that he had seen the infant plaintiff and appellant's car, and that appellant's car was traveling at a speed between twenty-five and thirty miles per hour (p. 59, ll. 18-29). On cross examination of this witness produced by the plaintiffs, he testified that the infant plaintiff came from the sidewalk on the south side of Twentieth Avenue, going towards the north (p. 60, ll. 23-27), that the infant plaintiff ran across the street or attempted to run across the street (p. 61, ll. 7-9), that he started running from the dirt

part of the sidewalk (p. 61, ll. 19-22) and that he was running fast (p. 61, ll. 23-40). This witness indicated that the parked car, instead of being parked on the right side of the street facing east, as above mentioned by the infant plaintiff, and the witness Michael Maloney, described that the car was parked with its front facing west so that the car would have been parked on its own left-hand side of the street (p. 62, ll. 15-34). Since, admittedly, there was a car parked in that location as all of the witnesses agreed, the direction in which it was facing would have no effect upon the accident. As illustrated in *Powers v. Standard Oil Company*, 98 N. J. Law, 730, 119 Atl. 273, affirmed by this Court 98 N. J. Law, 893, 121 Atl. 926, the direction in which the parked car is facing has no causal relationship to the accident. The witness went on to testify that the infant plaintiff ran from behind this parked car (p. 62, ll. 15-26) and that as the infant plaintiff ran from behind this car, appellant's car was but seven feet from where the infant plaintiff had been and that as the infant plaintiff ran out from behind the parked car, appellant's car was swerved to its left in an attempt to avoid the accident (p. 62, l. 37 to p. 63, l. 10).

Plaintiffs also produced the testimony of James A. Caspell who, at the time of the accident, was walking west along Twentieth Avenue, on his left-hand, or the south side of the street (p. 96, ll. 16-22). The witness testified that the infant plaintiff, before starting to cross the street, looked to his left and right and that the witness noticed a "truck coming up" (p. 96, ll. 27-30). The witness at first, on his direct examination, indicated that he did not see the impact and apparently did not see the appellant's car until after the impact. After describing how the boy had looked left and right, the following testimony appears:

“By the Court: \* \* \*

Q. All right, now go ahead. A. Now, then, he have crossed during the time as I was going by, and the only thing I remember that he is being hit by a car, which the car I didn't hear, and I had quite a long ways to see between here—pardon me, Lewis Street and Martin Street.

By Mr. Duffy:

Q. Now, did you see the Rizio boy lying in the roadway? A. Why, yes.

Q. And did you see the car? A. The car? I didn't see the car strike the boy.

Q. Well, after you saw the Rizio boy lying in the roadway did you see the car then? A. That is right” (p. 96, l. 33, to p. 97, l. 12).

The witness was then questioned as to what occurred after the impact and after he saw the boy lying in the street, and then, still on direct examination, he testified as follows:

“Q. What, if anything, did you do with the boy? A. Well, here is what I done. I have seen the boy get struck by an automobile.

By the Court:

Q. Wait a minute. Did you see this boy struck by the car? A. Yes, sir.

Q. A minute ago I thought you said you didn't see the car strike the boy. A. What I mean by that, I didn't notice the boy across that street, but he was there, and I seen the car strike the boy.

Q. You saw this particular car strike this particular boy? A. Yes, sir, that is right, sir” (p. 98, ll. 20-33).

The testimony of this witness, from that point on, more or less corroborates the version as described by the infant plaintiff. He mentioned that the boy had looked left and right when he was in front of the parked automobile, and that the boy

started across the street after the truck had passed (p. 102, ll. 18-32). He also mentioned that the infant plaintiff was trotting as he started across the street from the position in front of the parked car (p. 103, ll. 18-20), and he, too, says that the boy was struck by the left side of the front end of appellant's car (p. 103, ll. 23-34). This witness does not remember Michael Maloney having been with the infant plaintiff (p. 102, ll. 12-13), and he did not see appellant's automobile until the instant of the impact (p. 104, l. 32, to p. 105, l. 9). This witness, also on cross examination, was confronted with a statement which he had signed (p. 106, ll. 15-35) and at the end of which he had written, in his own handwriting, "I have readed above statement and find it true and correct" (p. 106, ll. 36-40, and p. 214, ll. 22-23). This statement was put in evidence on the defendant's case and became Exhibit D-4 (pp. 212-214). On the plaintiffs' case, the witness admitted having made some parts of the statement but denied others (p. 109, l. 25, to p. 114, l. 38). This signed statement was to the effect that the witness was seventy-five feet east of Dover Street when he heard a sound and then noticed the infant plaintiff on the pavement after the impact and that he had not seen appellant's automobile, or the infant plaintiff at any time until then.

Billy Winterberg, 14 years of age at the time of the trial, was also called as one of plaintiffs' witnesses, and he testified that he had not seen the accident itself (p. 118, l. 26), but that he went over to the scene of the accident after it had occurred and noticed skid marks on the pavement (p. 117, ll. 39-40) extending from the front of appellant's automobile to a point opposite the rear end of the parked car (p. 118, ll. 8-11) and that the skid marks were about ten feet long (p. 118, ll. 5-7).

This, together with certain lay and medical testimony as to the injuries, comprises plaintiffs' direct case and the testimony on which appellant's motion for the non-suit was based. On rebuttal, plaintiffs produced, as additional proof, the testimony of Detective James Brooks of the Paterson Police Department, who said that when he examined the appellant's automobile, after the collision, and after it had been taken from the scene of the accident, he observed that the left front grille was dented in a little bit and freshly scraped (p. 179, ll. 17-19).

After the trial court refused to grant appellant's motion for a non-suit, appellant produced the testimony of John K. Russell, William Molina and Joseph Moore as to the accident itself. Russell was the employee of appellant corporation who was operating the automobile involved in this accident. According to his testimony, he was proceeding east on Twentieth Avenue and when he was at Martin Street, he observed parked cars ahead of him and on his right, and children on the sidewalk (p. 121, ll. 22-32) and that they were then about one hundred and eighty-five feet ahead of him (p. 122, l. 40). He estimates his speed at about twenty to twenty-five miles per hour (p. 122, ll. 19-24). At the time that he observed these children, they were on the sidewalk and at no time while they were within his vision did they in any way move toward the curb or street (p. 123, ll. 7-13), but that when the front of his car was about even with the rear of a parked car, the infant plaintiff ran from in front of that car, directly across the street (p. 123, ll. 10-26). The witness estimated that as the boy ran out, he was from ten feet (p. 123, l. 16) to twelve feet (p. 135, l. 12) ahead of appellant's car. He also estimated the length of the parked car at twelve

feet (p. 135, l. 28). This witness estimated Twentieth Avenue to be about forty feet wide (p. 125, l. 10) and he estimated that in its original course he was operating his car about three feet out from the parked car (p. 122, ll. 26-28) and about twenty-two feet from his left-hand curb (p. 138, l. 18), so that he would have been on his own right-hand side of the road and about two feet to the right of the imaginary center line. The witness also testified that as the boy darted from in front of the parked automobile, he immediately applied his brakes, and swerved to his left, but that the right front bumper and right front grille of appellant's automobile came in contact with the infant plaintiff who fell to the pavement (p. 121, l. 34 to p. 122, l. 4). The witness estimated that his car traveled from twelve feet to fourteen feet after he applied his brakes (p. 124, ll. 13-16) and that it struck the infant plaintiff just before it stopped (p. 124, ll. 16-18), and that the infant plaintiff was still running and had gotten approximately eighteen feet out from the curb when the impact occurred (p. 137, ll. 33-37).

William Molina, another employee of appellant corporation, was riding in the same automobile and his testimony corroborated its driver. He said that the boy suddenly ran out into the roadway directly in front of the car in which he was riding; that he felt the brakes being applied immediately, and that the car was traveling approximately twenty miles per hour when the boy ran out into its path (p. 141). He estimated that when the boy ran out he was fifteen feet in front of appellant's car (p. 141, ll. 11-15).

Joseph Moore, appellant's next witness, was driving another automobile in the same direction as appellant's car was being driven, and in back of it, at the time of the accident. He estimated

the speed of appellant's car at about twenty to twenty-five miles per hour (p. 149, ll. 22-24) and he saw the infant plaintiff run from beyond the parked automobile (p. 149, ll. 25-37). The witness also testified that he could not see the boys beyond the parked car until they ran out from beyond it (p. 154, ll. 4-6).

Appellant also put in evidence two photographs of the front end of appellant's car marked Exhibit D-5 (p. 215) and D-6 (p. 217) showing a dent in the right half of the front grille of appellant's car as it appeared, according to appellant's witnesses after the impact.

It thus appears from the testimony that the infant plaintiff, with another boy, as they came to the Twentieth Avenue sidewalk from between the houses, reached their decision to give chase to Billy Winterberg, who was across Twentieth Avenue and to their left; that they ran to their right and eastwardly to the most distant parked car beyond which the boys concealed themselves and from which position the infant plaintiff half trotted on his way across the street. As to his observations, it appears that he looked, left, then looked right, saw a truck coming from his right and after five seconds, half trotted out without again looking to his left or in the direction from which appellant's car was traveling. It is appellant's contention that this conduct on the part of the infant plaintiff constituted negligence which was a sole or at least a contributing cause of the accident as a matter of law and that the question should not have been left to the jury.

Appellant recognizes that as a general rule, the negligence or contributory negligence of the parties to an accident, whether they operate vehicles on the highways or whether they be pedes-

trians, are questions of fact to be passed upon by juries and that this is particularly true when either of those parties is an infant.

The exception always makes the rule, and as is equally well settled by the decisions of our courts, negligence or contributory negligence is not always a question of fact for a jury. As frequently expressed by our courts, where "upon the evidence adduced, it shall clearly appear that such negligence does exist, and that it has a causal relation to an injurious accident, the question becomes one of law for the court".

*German v. Harris*, 106 N. J. L. 521 (at p. 524), 148 A. 619;

*Horowitz v. Schanerman*, 117 L. 314, 187 Atl. 346;

*Branigan v. Demarest*, 109 L. 123, 160 Atl. 319.

In measuring the conduct of the parties to this accident, we must, of course, heed the rules of law as they pertain to the conduct of users of public highways. As expressed in *German v. Harris, supra*, the operator of a vehicle on the highway is required to have his vehicle under proper control, to make reasonable observations as to conditions existing in the public streets, and to act as a prudent person would act under the circumstances. This obligation is mutual between all users of the public highway and each person may assume that others will comply with such duty. Insofar as applicable, the mutuality extends equally to pedestrians and drivers. In applying that measure of duty to the case at bar, where the presence of a parked car is involved, we find that the nature of the duties of both participants is not changed or altered, but is accentuated or enlarged by the presence thereof. The

parked car requires greater care on the part of appellant's employee, but by the same token, it also required of the infant plaintiff as a pedestrian the exercise of additional caution. *Powers v. Standard Oil Company, supra.*

There have been a number of decisions involving collisions between vehicles and pedestrians emerging behind obstructions, and a brief examination of some of them will readily illustrate that the testimony in the case at bar presented questions solely for the court's consideration. In *Rich v. Eldredge*, 106 N. J. L. 181, 147 Atl. 384, the trial court granted defendant's motion for a non-suit on the suit of a six-year-old plaintiff. The boy had been playing on the southerly sidewalk of Mechanic Street in Cape May Court House, on which there were parked two automobiles, one on each side of the street, and directly opposite each other. These cars left room between them for the passage of two cars going in the opposite direction with but a few inches to spare, and the defendant's car, proceeding easterly, and passing a westbound car, was in this space when the six-year-old plaintiff left the sidewalk, passed in front of the standing parked car on his right side of the street, and was struck after he had proceeded about one foot into the open space. In holding that there was no evidence of negligence on defendant's part, the court pointed out that as the defendant's car proceeded to pass the parked car, the boy was then standing on the sidewalk, and held that there was no reason to apprehend that he would suddenly pass out from his position of safety to a position of danger. It was also pointed out that the plaintiff was not then observable by defendant because the parked car obstructed defendant's view. This court affirmed the judgment of non-suit.

In *Branigan v. Demarest, supra*, the trial court granted defendant's motion for a non-suit on proof that the adult plaintiff was a passenger on a bus northbound along Belgrove Drive in Kearny, New Jersey, which stopped at an intersection to discharge passengers. Plaintiff was one of the first to alight, and as she alighted, she walked in front of the bus in a westerly direction, intending to cross the street on a crosswalk. Defendant was driving his car in the same direction as the bus was headed, and coming from behind the bus, passed it on its left, and struck the plaintiff. Plaintiff proved that she had looked to her right, which would be to the north, and that when she got to the westerly side of the bus, she looked left to the south, stepping out at the same time. She was struck immediately. There was proof that defendant was traveling at a high rate of speed and within one foot from the side of the bus. Defendant, in interrogatories, admitted a speed of from twenty to twenty-five miles per hour. This Court affirmed the judgment of non-suit and in its decision pointed out that there was evidence of defendant's negligence (speed, absence of warning and passing a standing bus at close proximity). It also pointed out that the plaintiff had a right to anticipate that her superior right under the Traffic Act would be heeded by the defendant, but held that having the right of way, plaintiff was not relieved of the legal duty to use reasonable care to avoid colliding with defendant's car. Citing with approval the Supreme Court decision in *Conrad v. Green*, 94 Atl. 390 (not officially reported) the court held that plaintiff had not made the reasonably effective observations required of her and was therefore guilty of contributory negligence, without which the accident would not have happened.

In *Conrad v. Green, supra*, the adult plaintiff was crossing West State Street, in Trenton, from the point on its north where Chancery Street opens into it, and passed directly in front of a stationary westbound trolley car which was on the northbound track, and which completely cut off plaintiff's vision of westbound traffic. He was struck as he emerged from the far side of the trolley car, by defendant whose car was westbound, and who had come up behind the street car. It was held that the defendant might have been negligent but that so was the plaintiff in crossing a narrow street when he knew that he had no knowledge and no means of knowing the conditions that were hidden from view by the street car. The Supreme Court then said at page 391 (and this language is quoted by this Court in the *Branigan* case, *supra*):

“\* \* \* \* The elemental rule of care required that the plaintiff should make some observation that would be reasonably effective for his own safety. The only observation he made was one that conclusively showed him that no effective observation could be made by reason of the standing car. If in this condition of affairs he walked directly in front of this obstruction to his vision, he took no care at all of the sort that the law requires. A delay of a fraction of a minute or a slight detour to the west in passing in front of the standing car would have offered some opportunity for an effective observation as to possible danger from the only source from which it might be apprehended. The course pursued by the plaintiff afforded him no opportunity to make any observation of the sort that, as a reasonably prudent man, he was required to make.”

Judgment for non-suit was affirmed.

In *Eagen v. Jersey City H. and P. Street Railway Company*, 74 N. J. L. 699, 67 Atl. 24, the trial

court refused to direct a verdict for defendant on the ground that the plaintiff was guilty of contributory negligence, and on the ground that there was no proof of defendant's negligence. Stating that there was no need to consider the question of defendant's negligence, this court pointed out that the adult plaintiff was a passenger on a northbound trolley car and alighted therefrom either while it was traveling very slowly, immediately prior to stopping, or after it had stopped. The trolley car then proceeded and plaintiff walked behind it, intending to cross the street, and as he proceeded, he had to cross the tracks on which cars of the same defendant ran in the opposite direction. He was struck by defendant's car as he entered upon those tracks, or as he reached a point in about the middle of the southbound rails. Plaintiff had testified that as he passed around the trolley car, from which he had alighted, he looked, but did not see the car which struck him because his view was still obstructed by the one from which he had alighted. He never did see the car which struck him and did not know what part of it struck him. In holding that a verdict should have been directed for the defendant, since there was no question to be submitted to the jury, this Court said that plaintiff had not looked for the approach of this car, except from a point where his observation was prevented by the car from which he had alighted, and that although that car was receding, and a short delay would have permitted observation, he did not wait; *that he made no observation even when on the narrow space between the tracks, (italics ours),* where if he had looked he would have seen the approaching car and avoided it. Such conduct could be neither reasonable nor legitimate and the only inference deducible therefrom was that plaintiff did not perform his duty. The court also said that the fact

that his negligence contributed to the injury was rendered conclusive by his admission that he did not know what part of the car struck him.

A case almost identical, on its facts, to the *Eagen* case, *supra*, is *Shuler v. North Jersey Street Railway Company*, 75 N. J. L. 824, 69 Atl. 180. In this case the plaintiff alighted from a street car and passed around the rear of it, being struck as he reached the rails on which a street car was traveling in the opposite direction. This Court held that the trial court should have granted defendant's motion for a non-suit since the plaintiff was guilty of contributory negligence in not looking or in not waiting until the obstruction to his vision was removed. The *Eagen* case was cited.

The principles of all of these decisions when applied to the testimony in the case at bar readily manifest that James Rizio, Jr., was guilty of negligence as a matter of law. True, he stated that he made an observation to his left, but he also testified that he saw nothing, that he then looked to his right and after that, waited five seconds for the truck to pass and then half trotted out, without further observation. It cannot be said that he satisfied the elemental rule of care as defined in the *Conrad* case, *supra*, and as quoted in the *Branigan* case, which requires that he "should make some observation that would be reasonably effective for his own safety". It is obvious, since James Rizio, Jr., saw nothing when he looked to his left, and since he admittedly did not see appellant's car at any time and did not know what part of it struck him (unless we accept the false conclusion to which he testified—false because it did not take into account the undisputed proof that appellant's car was swerved to its left in an attempt to avoid the boy), that his observation was not reasonably effective and

was not even opportune. Appellant's car must have been within sight at the instant when the infant plaintiff said he looked left, since the roadway was straight and level, but even if not, it certainly would have been visible had plaintiff looked again at the end of the five second interval. The only explanation is that plaintiff's vision must have been obstructed by the parked car itself, and the infant plaintiff was therefore obliged, either to lean forward so as to look around this obstruction in the direction from which appellant's car was approaching, or at least to have stepped forward to make an observation in that direction before undertaking to half trot across the street. This is particularly apparent when it is considered that the infant plaintiff had purposely and intentionally hidden in front of, or beyond that parked car so that he would be out of the range of vision of Billy Winterberg, and therefore of anyone approaching on foot, or in a vehicle, from that general direction. Had the infant plaintiff conducted himself in the manner as prescribed in the decisions above mentioned, he undoubtedly would have seen the approaching vehicle, and if he had then conducted himself in a prudent manner, as required, the accident would never have occurred.

During the trial of this case, and on the argument of the motion for non-suit, some importance was attached to the testimony that the infant plaintiff, at the time of the impact, was on the west crosswalk of Twentieth Avenue and Dover Street. Generally, a pedestrian, using a crosswalk, whether marked or unmarked, has the so-called right-of-way over vehicular traffic. R. S. 39:4-36. One question which immediately arises is whether or not the infant plaintiff was a pedestrian within the meaning of the Traffic Act and

the decisions interpreting it. It would seem that the provision of the Traffic Act must have been intended to apply to persons who, for the purpose of crossing a street, proceeded to an intersection, and then, conducting themselves in a normal manner, proceed across. This infant plaintiff, however, had not selected that spot because of the crosswalk, and it was by mere chance that he was on or near the so-called crosswalk. He crossed the street at that point because that was where the parked car was located. He chose not the protection of the crosswalk, but the "protection" of the parked car. Likewise, the Traffic Act cannot be said to give the right of way to any person who runs, or half trots across the street without making proper observations for his own safety.

Even if it should be found that the infant plaintiff did have the right of way because of the crosswalk, or for any other reason, he is still guilty of negligence which was the cause or, at least, a contributing cause of the accident. As has been frequently held, a pedestrian at a street crossing, who happens to have the right of way, under the Traffic Act, is not relieved of the legal duty to use reasonable care to avoid colliding with a vehicle should its driver disregard such right of way.

*Bora v. Yellow Cab Co.*, 103 N. J. L. 377 (at p. 380), 135 A. 889;

*Venghis v. Nathanson*, 101 N. J. L. 110, (at p. 113), 127 Atl. 175;

*Trimboli v. Public Service Coordinated Transport*, 111 N. J. L. 481, 168 Atl. 572;

*Branigan v. Demarest*, *supra*;

*Newman v. Katz*, 112 N. J. L. 49, 169 Atl. 643.

To illustrate, the *Bora* case, *supra*, involves a pedestrian at a crosswalk who had almost reached the far side of the street when he was struck by

defendant's taxicab which, at the time, was passing another vehicle on the right, instead of on the left. There was held to be a jury question, both as to defendant's negligence, and as to plaintiff's contributory negligence, but the court, in its decision, pointed out that the plaintiff was not relieved of his duty of using care.

Another illustration is in the *Trimboli* case, *supra*, where the plaintiff alighted from a street car, in the center of the highway, just after it had stopped, or as it was stopping, and took several steps toward the near, and right-hand curb. He was struck by defendant's truck, which was traveling in the same direction as the trolley car, at a speed of from twenty to twenty-two miles per hour. The plaintiff had brought suit against the owner and operator of the trolley car and against the owner and operator of the truck, and the trial court granted non-suits as to both defendants. The non-suit as to the defendant owner and operator of the trolley car was affirmed on two grounds: first, that there was no negligence shown, and, second, that the plaintiff was guilty of contributory negligence. The non-suit as to the owner and operator of the truck was affirmed on the ground that the plaintiff, as he stepped from the trolley car, looked neither to the right nor to the left and was guilty of contributory negligence. The fact that the plaintiff was alighting on, or near a cross-walk, and therefore had a superior right under the Traffic Act, was held not to relieve him from the duty of exercising care for his own safety.

The infancy of the plaintiff, James Rizio, Jr., has, of course, some bearing upon a consideration of the questions involved in this appeal. Infants, just as adults, are required to exercise care for their own safety, but in the case of infants, the ex-

ercise of care is measured by the degree of prudence which might reasonably be expected by persons of similar years. So in cases of infants under seven years of age, they are presumably *non sui juris* as a matter of law and not chargeable with contributory negligence. An infant above the age of seven is, on the other hand, deemed to be capable of exercising the care and judgment necessary to avoid and avert danger, and is therefore deemed capable of being guilty of contributory negligence. Thus, in considering the question of contributory negligence, the infant's age, his experience, his capacity to understand and avoid danger, as well as the circumstances of the particular situation, are all factors to be considered. It might also be added, that in the case of infants, even more than in the case of adults, it is usually a question for the jury to determine whether or not the infant is guilty of contributory negligence. As has been frequently held, however, for infants as well as adults, "where it appears beyond dispute that the child acted in entire disregard of the degree of prudence which may reasonably be expected of one of his years, and thereby contributes to his injury, then the question, contrary to the usual rule, becomes one for the court to determine". This quotation is from the decision of this Court in *David v. W. J. and S. R. R. Co.*, 84 N. J. Law 685, 87 Atl. 440, in which decision the entire question of contributory negligence of infants is discussed.

Decisions holding infants guilty of contributory negligence, as a matter of law, will readily illustrate that in the case at bar a court question, rather than a jury question was presented. In *Fitzhenry v. Consolidated Traction Company*, 64 N. J. Law, 674, 46 Atl. 698, the plaintiff, a girl nine years of age, during daylight, was crossing New-

ark Avenue in Jersey City, with a three-year-old brother. They had stopped on the curb of the street, when a friend on the opposite side waved to plaintiff, and they then started across. She was described as "running" by one witness, but as "walking" by another, but when she reached the gutter, she walked "right quickly". They crossed an eastbound car track on which a car had just passed them and both the plaintiff and her brother were struck just as they reached the first rail of the westbound track. There seems to have been some proof to the effect that the defendant's car was moving at a high rate of speed and that the operator had his head turned, looking in store windows, on his left, at the time of the accident. This court affirmed a non-suit finding it unnecessary to determine the question of defendant's negligence since it was held that plaintiff was guilty of contributory negligence as a matter of law. The following very pertinent language appears in the decision, starting at page 677 of the New Jersey Law Reporter:

"Under such circumstances as these, it is plain that an adult plaintiff could not recover because of contributory negligence. Does the youthfulness of the plaintiff, who was at the time nine years of age, prevent the operation of this rule, or at least make the question one for the jury? The plaintiff was admittedly *sui juris*, and of an age when she was required to exercise reasonable care, to a degree that is usually exercised by children of that age who are ordinarily careful. *Beach Cont. Neg. 136*, and cases cited; *Consolidated Traction Co. v. Scott*, 29 Vroom 682.

It is true that in such cases the question of contributory negligence is generally, if not always, a question for the jury. But this doctrine will not warrant a recovery when the child suddenly puts himself in a dangerous place, where there was no reason to expect

him, and too late for the danger to be averted by the person inflicting the injury. 7 Am. & Eng. Encycl. L. (2d ed.) 409, and note.

The salutary rule of duty which requires the ordinary traveler, in crossing a street railway to use his powers of observation to discover approaching vehicles, and his judgment how and when to cross without collision is also binding upon the child that is sui juris; and if the facts are undisputed, and it appears clearly that he has acted in entire disregard of that degree of prudence which may be reasonably expected from one of his years, and he suffers injury thereby, he cannot recover, and in that case the question of contributory negligence becomes one for the court to determine.

\* \* \* \* \*

In the present case the testimony is that the plaintiff lived only a block or two away from Newark Avenue, where the accident occurred, and we must assume that she was familiar with the running of the trolley cars there, and the danger of collision therewith in crossing their tracks, unless care is exercised.

I think, therefore, that when the plaintiff attempted to cross defendant's tracks at a quick pace, as she did, either in front of the car, which she saw, or by rushing heedlessly into danger without looking, acted in such entire disregard of her duty that there is room but for one opinion, and that is that she was guilty of contributory negligence."

*Clerici v. Gennari*, 102 N. J. Law 377, 132 Atl. 667, involves a boy between fourteen and fifteen years of age, who was struck by defendant's truck on Paterson Avenue in West Hoboken, about ten feet from an intersection. The plaintiff, with several other boys of about the same age, during daylight, were playing ball in the street, and the plaintiff, in attempting to catch the ball, ran backwards, and thus came in contact with defendant's truck.

This court did not mention or discuss the proof as to defendant's negligence because, as it pointed out, the proof of contributory negligence was too clear. In holding that the trial court should have entered a non-suit, this Court said at pages 379-380 of the New Jersey Law Reporter:

“\* \* \* He was engrossed in the game he was playing. He was unconscious of the approach of the truck. He could have seen it if he had looked. There was nothing which would have obstructed his view of its approach. The only reason he did not see it was because his attention was wholly centered upon the game he was playing. The plaintiff was between the years of fourteen and fifteen when the accident occurred. He was a normal boy in possession of all his faculties. He was sui juris. He knew the danger of using as a playground a thoroughfare upon which there were passing and repassing motor vehicles. He must or should have known the danger of playing ball in a street. He ought, and probably did, know of the danger incident to running backwards in a street after a batted ball. Where one has been the cause of his own injury, by his thoughtless action, he cannot recover.

This question has been the subject-matter of numerous decisions in the courts of this state. The law is well settled that a person, crossing a street on foot, is bound to look out for approaching vehicles, and if he neglects to do so and is hurt he will be considered to have contributed to the injury and will be barred from recovery against the one who inflicted it. *Sheets v. Connolly Street Railway Co.*, 54 N. J. Law, 518. The same rule obtains to one who is playing in the street.”

In *North Hudson County Railway Co. v. Flanagan*, 57 N. J. Law, 696, 32 Atl. 216, the plaintiff, a boy nine years of age, was also playing ball in a public street and was struck by defendant's

horse car. It appeared that as the car was approaching, plaintiff started to run across the street in front of it to avoid being hit by a ball which was being thrown to him by a playmate. As he ran, he looked back over his shoulder at his playmate, unconscious of the approach of the car until it was within four feet of him. It appeared that there was no obstruction to prevent the plaintiff from seeing the car as it approached and the court therefore held that as a person crossing a street on foot, he was bound to look out for approaching vehicles, and since neglecting to do so, he was hurt, he would be considered to have contributed to his injury by his negligence, and would be barred from recovery. It was also stated that there was nothing in the evidence to warrant the idea that the plaintiff did not have sufficient mental capacity to know the danger of attempting to cross the street in front of a moving horse car and to avoid such danger. It was said that a boy of his age, even if mentally not up to the standard of other boys of the same age, is not altogether exempt from the exercise of care, and that when the evidence shows he has been the heedless instrument of his own injury, he could not recover.

Just as the infant plaintiffs in these cases were charged with contributory negligence as a matter of law, so in the case at bar, the infant plaintiff should be charged with the same kind of negligence. The fact that he lived near the scene of this accident for over five years, his training and schooling, and even his conduct at the time of the accident, showed that he had the requisite appre-

ciation of the danger in his actions. The fact that the infant plaintiff even testified that he looked to his left and the fact that he looked to his right and saw a truck and that he waited for that truck to pass, show his capacity to understand and his state of mind. It is sometimes indicated that infants should not be chargeable with the same degree of care as adults because they are naturally inclined to be more heedless, because they have a less sound judgment and because they are inclined to act more on impulse than adults. The testimony shows, however, that we have no such elements in this case. This infant plaintiff was not acting on infantile impulse, as is illustrated by his very plan to chase Billy Winterberg without being seen, and this plan was present in his mind from the time that he ran from between the houses to the sidewalk, all the while he was running east on Twentieth Avenue, while he was hiding in front of the parked car, and until the instant when he was struck by appellant's car.

Another factor to be considered is that in a great number of cases cited by appellant, the pedestrians involved were upon the highways in full view of the operators of the vehicles. James Rizio, Jr., having purposely concealed himself, his negligence is even more pronounced.

Because of the conduct of the infant plaintiff, because it constituted negligence which was either the sole or at least a contributing cause of the accident, appellant contends that the trial court should have controlled the case by granting a nonsuit or directing a verdict in appellant's favor.

## POINT II.

**The proofs at the close of the plaintiffs' direct case and also at the end of the entire case, do not show that the appellant was guilty of any negligence which was the proximate cause of the accident.**

Referring back to the testimony in this case, we find that as far as the course of conduct of the appellant's employee is concerned, he was driving east on Twentieth Avenue at a speed estimated by different witnesses to be between twenty and twenty-five to thirty miles per hour, or at a speed described by the infant plaintiff himself to be "pretty fast" and described by plaintiffs' witness, Michael Maloney, to be "quite fast" and that as appellant's employee reached a point so that the front end of his car was even with the rear end of a parked car, its operator saw the infant plaintiff suddenly dart out from beyond that parked car. At that instant appellant's car was swerved to its left and its brakes were immediately applied, all in an attempt to avoid colliding with the infant plaintiff. It further appears that when this car had been a short block away, and at a distance estimated to be one hundred and eighty-five feet, appellant's employee saw children playing on the sidewalk, near the parked car, but that while they were within his line of vision, they neither made any motion nor gave any indication that they were going to enter upon or attempt to cross the street. The proof, on the other hand, was that the highway, the intersection and the crosswalk were clear as appellant's car approached the scene of the accident.

As mentioned above, users of the highway are required to have their vehicles under proper control, to make reasonable observations as to existing conditions, and to act as prudent persons would act under the circumstances. It is submitted that appellant, through its employee, was doing all of that. First, as to the driver's observations, he testified that he saw the parked car and the children on the sidewalk. The plaintiffs' own proof, insofar as it showed that the infant plaintiff was hiding from anyone approaching from the direction from which appellant's car was approaching, illustrates that the driver observed everything within his line of vision. Likewise the uncontradicted proof that the car was swerved at the last instant, plaintiffs' proof that the impact occurred towards the center of the street, and plaintiffs' proof that the appellant's car was brought to a stop with its rear end about even with the front end of the parked car, and plaintiffs' proof that appellant's car left skid marks extending from the front of appellant's car after it stopped, to a point opposite the rear of the parked car, and that the skid marks were only ten feet long, all tend to show that appellant's driver had excellent control over his vehicle.

In *Rich v. Eldredge, supra*, the defendant was confronted with the same sort of situation as was presented in the case at bar. As the vehicle in that case was passing a parked car, the six-year-old plaintiff was standing on the sidewalk. It was held that the defendant had no reason to apprehend that the child would suddenly pass out from his position of safety to a position of danger in front of the moving car. Appellant's employee was entitled to make the same assumption.

Of similar import is the language of the Supreme Court in *Cohen v. Public Service Transportation Company*, 7 Misc. 237, 145 A. 106, which was on plaintiff's rule to show cause for a new trial. In commenting upon a part of the trial court's charge, the Supreme Court said at page 238 in the Miscellaneous Reporter: "Obviously if, as the instructions require, the driver of the bus was in the exercise of reasonable care, he could not be charged with negligence in failing to anticipate that a pedestrian would come from in front of another bus in the path of the bus he was driving."

In *Boyer v. Great Atlantic and Pacific Tea Company*, 99 N. J. Law 451, 124 Atl. 778, defendant's truck, drawn by a team of horses, was proceeding southwardly while defendant's trolley was proceeding in the opposite direction. The plaintiff, seven years of age, with another boy, had been hitching a ride on the rear of the trolley car, and when the heads of defendant's truck horses were about even with the middle of the trolley car, going in the opposite direction, the plaintiff and another boy jumped from the rear of the trolley car and started to run across the path of defendant's horse truck. The one boy managed to reach safety, but the plaintiff tripped and fell and was run over by a wheel of the truck. It appeared that defendant's agent had observed these boys as they climbed on the trolley car a block away. A verdict for the plaintiff was reversed and it was held that a non-suit should have been entered since the proof did not disclose negligence chargeable to the defendant. It was said in the opinion that defendant was not required to anticipate plaintiff's conduct.

As far as proof of negligence on the part of appellant is concerned, there remains but the one

element of speed. Appellant contends that such speed as may have been proven in this case does not constitute such negligence as would have been the proximate cause of the accident and that, therefore, a jury question was not presented. From the testimony, it appears that the infant plaintiff himself never did see appellant's automobile; that plaintiffs' witness, Michael Maloney, only saw the car as it traveled the last eight feet; and that plaintiffs' witness, James A. Caspell, did not see the automobile until the instant of the impact. On the other hand, however, plaintiffs' witness, David Mornick, testified that as the plaintiff ran out from beyond the parked car, appellant's automobile was seven feet away; appellant's driver John K. Russell testified that as the infant plaintiff ran out from behind the parked car the front end of appellant's automobile was even with the rear end of that parked car and that the infant plaintiff was ten to twelve feet ahead of appellant's automobile, and appellant's witness William Molina, testified that as the infant plaintiff ran out, he was fifteen feet ahead of appellant's automobile. Considering along with this proof, the fact that the infant plaintiff was intentionally hiding so as not to be visible to persons approaching from the direction in which appellant's car was approaching, and the positive testimony of appellant's witness, Joseph Moore, who was operating another automobile in back of the one involved in the accident, that the infant plaintiff was not visible due to the parked car until he ran out from behind it, together with the testimony that the infant plaintiff was half trotting, according to himself, Maloney and Caspell, or running, according to Mornick (plaintiffs' witness), Russell, Molina and Moore, it is readily apparent that the accident would still have happened even if appel-

lant's automobile had been proceeding at a slower speed.

As stated in *Claypool v. Motor Finance Corporation*, 125 N. J. Law 440, 15 A. 2d 794, "speeding in itself is not always actionable negligence. It must be the proximate or contributing cause of the accident."

In *Martens v. Martens*, 11 Misc. 705, 167 Atl. 227, a verdict for the plaintiff returned in the Bergen County Court of Common Pleas was reversed and set aside by the Supreme Court. The plaintiff in that case was a passenger in defendant's automobile which was being driven in a residential area at a speed of thirty miles per hour. At an intersection, a car traveling at a faster speed, emerged from defendant's right directly in front of defendant's car. Defendant swerved sharply to his left and struck a pole, as a result of which the plaintiff was injured. It was held in this case that the speed of defendant was not the proximate cause of the accident.

Proximate cause has been defined "as the force or operating factor without which the accident would not have happened." The question of proximate cause is sometimes determined by the application of what sometimes has been termed the "but for" test or, in other words, would the accident have happened but for the element complained of.

*Powers v. Standard Oil Co., supra*;  
*Millman v. U. S. Mortgage and Title Guar.*  
*Co.*, 121 N. J. Law, 28 (at p. 37), 1 A. 2d 265.

Assuming that plaintiffs' proofs were sufficient to establish a speed limit in the area where this accident happened, it is submitted that the accident would still have happened even if appellant

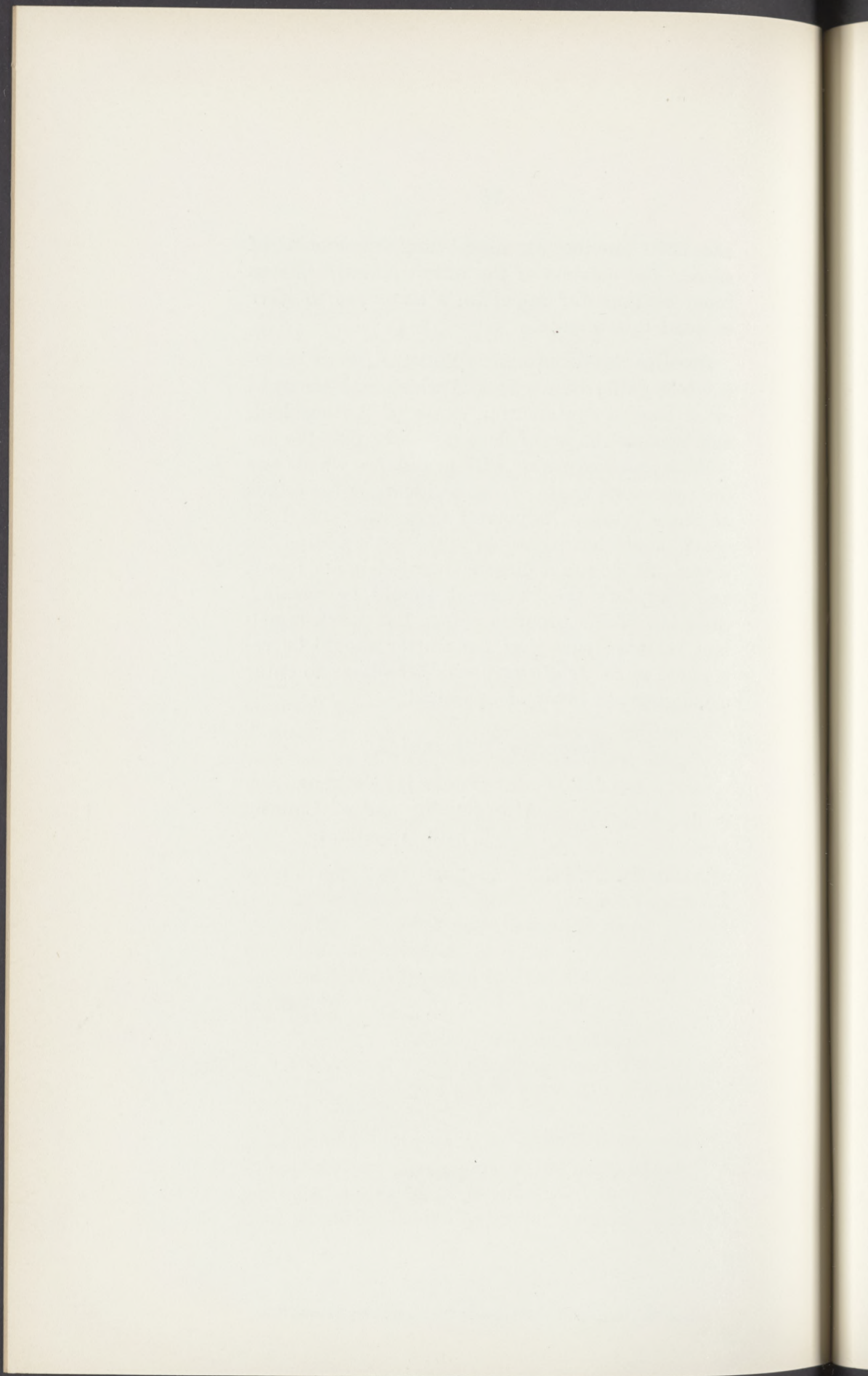
had been moving at almost any other rate of speed. The conduct of the infant plaintiff left no room or time for appellant's employee to have avoided this impact.

Because the proof shows that the infant plaintiff was guilty of negligence which was the sole, or at least a contributing cause of the accident, and because the proof does not show that the appellant was chargeable with negligence which was the proximate cause of the accident, or for either of those reasons, appellant urges that the trial court should have granted appellant's motion for a non-suit or for a directed verdict in its favor, and therefore the judgment should be vacated. Since all of the proof is before the court, appellant further urges that the matter should be remanded to the trial court with directions to enter a judgment in favor of appellant.

Respectfully submitted,

HENRY H. FRYLING,  
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with Appellant.

WILLIAM H. SPEER,  
RICHARD FRYLING,  
Of Counsel.







**New Jersey Court of Errors and Appeals**

JAMES RIZIO, JR., an infant by his next friend, James Rizio, Sr., and JAMES RIZIO, SR., individually,  
 Plaintiffs-Appellees,

*vs.*

PUBLIC SERVICE ELECTRIC AND GAS COMPANY, a corporation of the State of New Jersey,  
 Defendant-Appellant.

Action at Law.  
 On Appeal from  
 New Jersey  
 Supreme Court,  
 Passaic County.

**BRIEF OF PLAINTIFFS-APPELLEES.**

**Statement of Facts.**

At approximately 4 o'clock in the afternoon, on Monday, April 10th, 1939, the infant plaintiff, James Rizio, Jr., who was ten years and ten months of age and a student in the sixth grade of one of the public schools in Paterson, a pedestrian, was injured when struck by a Ford Coupe automobile which, at that time, was owned by the appellant, Public Service Electric and Gas Co. and operated by its employee, John K. Russell. The accident occurred in the City of Paterson on Twentieth Avenue which runs generally east and west. The automobile in question was traveling from west to east on Twentieth Avenue and the infant plaintiff was crossing Twentieth Avenue from the south side to the north side at a point where Dover Street intersects, but does not cross Twentieth Avenue and which beginning at Twentieth Avenue extends northerly. The infant plaintiff was on the west crosswalk at this "T" inter-

section. The infant plaintiff had been playing on Martin Street and he went over to Dover Street where he intended to play with Billy Winterberg, an infant friend of his. He went out into the street at the above mentioned crosswalk and was about four feet in front of the left head-light of a parked car when he made an observation. With him at the time was another infant playmate, Michael Maloney. James Rizio, Jr. looked first to the left, and then he made an observation to his right and saw an old truck traveling across the intersection. The boys waited for this truck for about five seconds and then the infant plaintiff started to cross Twentieth Avenue at what he called a "half-trot".

Plaintiffs produced witnesses to corroborate this version of the accident and produced further testimony concerning the speed at which the defendant's car was being operated at the time of the accident. The witness, Michael Maloney testified that he saw the car when it was about eight feet away from the point of impact and at that time the car was traveling "fast". David Mornick, a witness for the plaintiff, testified that the car was being operated at a rate of speed approximating 25 to 30 miles per hour. William Winterberg testified that there were skid marks of ten feet in length which extended from the front of the defendant's car to a point opposite the front of the parked car. James A. Caspell corroborates the fact that the infant plaintiff made an observation both to the left and the right before proceeding across the intersection. He further testified that he saw a dent on the left side of the grille of defendant's car and that the distance between the defendant's car when it came to a stop and where the boy was on the ground measured approximately 25 to 30 feet.

Briefly, the above are the facts which the plaintiff produced at the trial. In the points of the replying brief, the plaintiffs-appellees will discuss the facts, at length, with their proper reference and location in the State of Case.

Since the question of the infant plaintiff's sole negligence as discussed in point one in the defendant-appellant's brief, and the question of whether the defendant-appellant was guilty of any negligence which was the proximate cause of the accident as discussed in point two of the defendant-appellant's brief are so closely related, that the plaintiffs-appellees will discuss them together in point two of the brief of the plaintiffs-appellees and will discuss solely the question of contributory negligence in point one of the replying brief.

### POINT ONE.

**The question of contributory negligence was a question of fact for the jury and was properly submitted to the jury by the trial court.**

The question of contributory negligence of the infant plaintiff was one of fact and the trial court submitted this question of fact, under proper instructions to the jury.

In presenting their argument, the plaintiffs-appellees will discuss, first, the facts and law to substantiate their contention that the question of contributory negligence was one for the jury; and secondly, will discuss, at length, the cases urged by the defendant-appellant in its brief.

A—The defendant in the grounds of appeal and in the first point contends that the court should have granted a nonsuit and a direction of verdict on the ground that defendant was not guilty of any negligence which was the proximate cause of

the accident and that the proofs disclose that the infant plaintiff was guilty of contributory negligence.

For the purpose of a motion of nonsuit and direction of verdict, the law is well settled "that in passing upon motions to nonsuit and for the direction of a verdict, the court cannot weigh the evidence, but must take as true all evidence which supports the view of the party against whom the motions are made and must give that party the benefit of all legitimate inferences which are to be drawn therefrom. And unless it is established by the evidence beyond fair debate that plaintiff was negligent, and that his negligence directly contributed to the injury complained of, a motion to nonsuit or direct a verdict will be denied. The question of contributory negligence, in a case such as this, is in a peculiar sense one for a jury."

*Yates v. Madigan*, 112 N. J. L. 443 (at p. 446);

*Andre v. Mertens*, 88 N. J. L. 626;

*Shields v. Yellow Cab Inc.*, 113 N. J. L. 479;

*Kennedy v. U. S. Fidelity &c. Co.*, 113 N. J. L. 431;

*Lipschitz v. New York and New Jersey Produce Corp.*, 111 N. J. L. 392.

Thus in the presentation of the plaintiffs' argument the facts which will be urged for the purpose of this discussion must be taken as true. Furthermore, all legitimate and logical inference which can be deducted from these facts favorable to the plaintiffs must be taken into consideration when analyzing the factual situation and determining whether the element of contributory negligence exists as a matter of law.

James Rizio, Jr. was ten years ten months of age at the date of the accident. Consequently, we

are confronted with the situation where the law applicable to infants must be used as a guiding factor in determining whether the infant exercised proper care and caution at the time of the accident and in determining the conduct of the parties involved with relation to the well settled rules of law.

In the case of *Rinaldi v. Levgard Structural Co.*, 97 N. J. L. 162, at page 164, the court held "that the degree of care required of a child old enough to be capable of negligence is such as is usually exercised by persons of similar age, judgment and experience, and that in order to determine whether a child old enough to be capable of negligence has been guilty of contributory negligence, it is necessary to take into consideration the age of the child and its experience and capacity to understand and avoid dangers to which it is exposed in the actual circumstances and situation under investigation, and that it is usually a question for the jury to determine whether a child has been guilty of contributory negligence."

This principle is also enunciated in the cases of *Mancino vs. Urbaniak*, 120 N. J. L. 424, and *David v. West Jersey &c. Seashore Railway Co.*, 84 N. J. L. 685.

In the case of *David vs. West Jersey &c. Seashore Railway Co.*, *supra*, the court held:

"the degree of care required of a child is such as is usually exercised by persons of similar age, judgment and experience. *Traction Company v. Scott*, 29 Vroom 682. The reason for the rule is this: The conduct of a child should not be measured by the standard of care applied to an adult, because the immaturity of youth ordinarily embraces not only imperfect knowledge of natural facts and laws and of the proper relation between cause and effect, but when possessed of these elements necessary to the exercise of reason-

able care, it still lacks the discretion, thoughtfulness and judgment presumed to be an attribute of the ordinary prudent adult, and which may be said to come only with experience. Thoughtlessness, impulsiveness and indifference to all but patent and imminent dangers are natural traits of childhood, and must be taken into account when we come to classify the conduct of the child. *Mann v. Missouri, &c., Railway Co.*, 123 Mo. App. 486.

And so in order to determine whether a child in such transition period has been guilty of contributory negligence, it is necessary to take into consideration the age of the child, and its experience and capacity to understand and avoid the danger to which it is exposed in the actual circumstances and situation under investigation; and it is usually a question for the jury to determine whether the child has been guilty of contributory negligence."

An excellent application of the principles above stated in reference to contributory negligence and to the facts in this case is found in the case of *Mancino v. Urbaniak*, 120 N. J. L. 424. In that case the court had to determine whether the question of contributory negligence existed as a matter of law. The facts disclosed that the infant plaintiff was seven years three months of age at the time of the accident. He had been riding on the rear end of a milk wagon on a city street in Trenton and the driver ordered the child from the wagon.

The infant plaintiff ran towards the west curb of the street and at or near the curb he stopped to go to his home which was on the other side of the street. He looked to his left (the direction from which the defendant's automobile approached) before he started to cross, but did not see any automobile. After he had passed completely in front of defendant's automobile, he was struck by the mudguard on his far side of the car, and

was thus injured. According to plaintiffs' evidence the defendant's automobile was running at a speed of from 35 to 40 miles per hour.

The court held as follows:

“With respect to the contention that a verdict should be directed on the ground that the infant plaintiff was guilty of contributory negligence, we consider that contention to be without merit. We have pointed out that the evidence tended to show that the infant child, before he started to cross the street looked in the direction from which the defendant was coming and saw no car. Moreover, in order to determine whether a child old enough to be capable of negligence has been guilty of contributory negligence, it is necessary to take into consideration the age of the child and its experience and capacity to understand and avoid danger to which it is exposed in the actual circumstances and situation under investigation; and it is usually a question for the jury to determine whether or not a child seven years and three months old, has been guilty of contributory negligence, and especially so where, as here, the evidence tended to show that the child, who was injured in crossing a street by a fast-running automobile, before crossing made some observations and saw no car approaching.”

Another case in which the facts involve an infant crossing a street and the question of contributory negligence as a matter of law is *Eastmond v. Wachstein*, 4 N. J. Mis. 966, the facts, in that case, were, that the infant plaintiff, at the time he met with the accident, was eight years 6 months of age. While in the act of running across Kearney Avenue, a much frequented public highway, forty-eight feet in width, between the curbs, in the town of Kearney, he was struck and seriously injured by an automobile operated by the defendant along the avenue.

There was proof that the infant plaintiff had almost crossed the highway, and had only a few feet more to reach the sidewalk, when he was run into by the defendant's automobile and knocked down. There was also testimony to the effect that the automobile was being driven along the highway at an excessive rate of speed, estimated to have been between twenty-five to thirty miles an hour; that though the defendant immediately applied the brakes when he discovered the boy, the car sped on for a distance of twenty-five feet from the place of impact before it was halted.

This was the phase of the plaintiff's case when it was rested. On behalf of the defendant, a motion for a nonsuit was made upon the ground that the plaintiff was guilty of contributory negligence, which motion was denied.

On appeal the court held:

“That the refusal to grant a nonsuit was proper. There was nothing appearing in the testimony, on the part of the plaintiff, which would have warranted the trial judge to have taken away from the decision of the jury the question whether, under the condition then existing in the public highway, the infant plaintiff exercised that degree of care reasonably to be expected of a child of his age, intelligence and experience.

He was not required, as a matter of law, to exercise the same degree of care and caution to avoid injury as is required of adults under similar circumstances. 29 Cyc. 535. In *Fitzhenry v. Consolidated Traction Co.* (Court of Errors and Appeals), 64 N. J. L. 674, No. 2 of the syllabi reads: ‘In actions for injury to a child of that degree of responsibility when crossing a street railway, the question of contributory negligence is generally one for the jury, but when it appears beyond dispute that the child in its attempt to cross acted in entire disregard of the degree of prudence which may reasonably be expected from one of his

years, and has thereby contributed to the collision that caused the injury, then, the question, contrary to the usual rule, becomes one for the court.'

In the present case it is urged, on behalf of the defendant, that since it appears on the plaintiff's case that the infant plaintiff had been cautioned by his mother of the danger to be encountered by automobile vehicles in crossing Kearney Avenue, which he in going to and from school, at least four times daily, he was made fully aware of the danger to be apprehended in crossing the avenue, and, hence, when he saw or could have seen the offending automobile approaching at the time it reached Locust Avenue, a distance of more than two hundred feet away from the point where he started to run across the street, his conduct in that regard was *per se* negligent, and, as such negligent act contributed to his injury, he was debarred of the right to a recovery. This contention is palpably unsound. It is a matter of common knowledge that there is hardly ever a time when an automobile cannot be seen approaching on the public street from one direction or another. What was said in *Newark Passenger Railway Co. v. Block*, 55 N. J. L. 605, by Mr. Justice Magie, speaking for the Court of Errors and Appeals (at page 613) is pertinent here: 'Its claim is that such observing must be extended to any approaching car, no matter how distant. But this is obviously an exaggerated notion of the duty required. The most prudent man would never suppose himself required to thus observe. If such a rule or duty were adopted and practiced in a crowded city, the crossing of many streets would be barred to pedestrians for a great part of the time. The general rule to which we have recurred does not justify this excessive view of the duty required. It will require one crossing the roadway on foot to extend his observations only to the distance within which vehicles proceeding at customary and reasonably safe speed would threaten his safety.'

The fact that the infant plaintiff could have seen the car approaching at the time he was crossing the avenue was only a circumstance which must be considered with other circumstances present as to whether or not he exercised that degree of care or caution that could be reasonably expected from a child of his age. \* \* \* And, so, here the defendant had no right to propel his automobile at such a rate of speed as was incompatible with the safe and customary use of the street by others, and the infant plaintiff was under no legal duty to apprehend that the car was coming at such a high rate of speed that it would reach him before he reached the sidewalk."

A similar situation involving an infant pedestrian and the question of contributory negligence as a matter of law is presented in the case of *Scott-Huntington v. Pearson*, 11 N. J. Mis. 642, where the cause of action involved the death of a boy ten years of age, who was struck by an automobile. The accident occurred on a public highway in front of a country school during a noon hour while the children were out in the yard. Some of them were playing with a ball and it was thrown through the gateway of a hedge fence, which partly surrounded the yard, and rolled out to the center of the road. The Scott-Huntington boy ran after it, followed apparently by three other children. The latter, evidently seeing the approaching automobile, ran back to the gateway, but the former went on, although warned by one or two of the children to come back. He reached the middle of the road and was seen to bend over to pick up the ball, when he was startled by the sound of the horn of the automobile. He straightened up and stood as though dazed. When the car was within four or five feet of him, he suddenly jumped or stepped in front of it. The driver pulled the car sharply to the left, but not

in time to avoid striking him. The infant was knocked down and fatally injured. The vehicle went first to the left side of the highway, striking the telephone pole, and then across to the right side, where it stopped after running into the hedge fence, a distance of twenty-five or thirty feet beyond the place of the accident.

Counsel for defendants urged that the trial judge should have controlled the case and taken it from the jury as a matter of law on the motion for a nonsuit or for a direction of verdict at the close of the trial.

The court held:

“This seems not to be so considering the age of the boy and the speed of the car at the time.

The driver's own statement was that he saw four children run out of the yard when the automobile was one hundred feet away and going at forty miles an hour; that three of them turned back, but the fourth went to the center of the road and leaned over to pick up something; that, as the horn of the car was sounded, the boy straightened up and stood still, whereupon he pulled the car to the left, and when it was four or five feet from the boy, he suddenly jumped or stepped in front of it and was hit. He (the driver) was not able to say what rate of speed the automobile was reduced from the time he first saw the children to the place of the accident. He had applied the brakes, although the car had gone some distance after striking the boy. There was some testimony to the effect that the school building could have been seen, in the condition existing at the time, at a distance of several hundred feet from the direction in which the car was being driven. While it did not appear that either of the defendants made any observation as the automobile approached, they testified that the hedge about the school yard obscured the view of it and that no sign indicated the presence of

a school zone. This appears to have been discovered by them after the accident, the driver stating that in fact he was looking ahead and making no special observation in driving along as to the locality through which they were passing. It is apparent, however, that the speed at which the automobile was being driven at the time, in its causal relation to the accident, became a question for the jury. *Ferris v. McArdle*, 92 N. J. L. 580, 581; 106 Atl. Rep. 460; *Nicholas v. Grunstein*, 105 N. J. L. 363; 144 Atl. Rep. 593; *Balog v. F. M. Mitchell Motor Co.*, 3 N. J. Mis. R. 1000, 130 Atl. Rep. 441; *Eastmond v. Wachstein*, 4 N. J. Mis. R. 966, 135 Atl. Rep. 67; *DeLucia v. Bleha*, 5 N. J. Mis. R. 501, 137 Atl. Rep. 428."

In the case of *Powers vs. Standard Oil Co.*, 98 N. J. L. 730, which case is also cited by the Appellant in its brief, the defendant, Standard Oil Co. violated the traffic act by parking its large truck on the wrong side of the street. A nine year old child ran from behind the truck and attempted to cross the street and not perceiving the automobile of the defendant McGuire coming up the street in a northerly direction, ran into its front mudguard and sustained fatal injuries. In this case the question of contributory negligence was submitted to the jury and the court on appeal held: "The controverted question as to the contributory negligence of the child was properly submitted to the jury."

The cases which have been cited above are illustrative of situations where the infant pedestrian's conduct, at the time of the accident was submitted to the jury. There are many cases where the contributory negligence of an adult involving facts similar to the case at bar were submitted to the jury and which on appeal were sustained by the Court of Errors and Appeals as having been properly submitted by the trial court.

Appellees desire to cite several of these decisions to support their contention, because if the court held that the adult's contributory negligence in such cases are jury questions, then, certainly, in similar situations they will likewise be jury questions where infants are involved. It would seem that if the conduct of a normal adult was such that the question of contributory negligence was submitted to the jury, then it would logically follow that an infant's contributory negligence in a similar situation is a jury question especially when the conduct and the care expected of a ten year old child is usually not the same as that of a normal adult.

In the recent case of *Volpe v. Perruzzi*, 123 N. J. L. 323 which affirmed the Supreme Court decision reported in 122 N. J. L. 57, the plaintiff was injured while walking on a crosswalk. The intersection at which the accident occurred is a peculiar one in that there are five crossings there. It was dark and there was snow on the ground. Plaintiff testified that he was crossing on the crosswalk with other people when he was struck by defendant's car. Defendant testified that he stopped his car on the near side of the street, then he started up and proceeded across, with his lights on, at ten miles an hour, and that plaintiff was struck on the far crosswalk.

There was a motion for nonsuit and direction of verdict in that the plaintiff was guilty of contributory negligence as a matter of law, which motions were denied by the trial court. On appeal the Court of Errors and Appeals held:

“The argument of the appellant is based on testimony of the respondent that he made an observation in all ways and had a good view and did not see the car approaching. The appellant takes the position that, where the plaintiff testifies he made an observation but did not see an approaching car, the rule

is that he is guilty of contributory negligence as a matter of law, for the reason that if he had made the effective observation which a reasonable man should make under the same circumstances, he would have seen the car. That is generally the rule as it is stated in the cases relied on by the appellant, including *Branigan v. Demarest*, 109 N. J. L. 123, and *Trimboli v. Public Service Co-ordinated Transport*, 111 Id. 481. It is not controlling here."

For the Supreme Court, the chief justice said:

"The facts in this case are quite different from those in the cases just mentioned. Further, our Traffic act (R. S. 39:4-36) provides that the driver of a vehicle 'shall yield the right of way to a pedestrian crossing a roadway within any marked crosswalk or within any unmarked sidewalk at the end of the block except at intersections where the movement of traffic is being regulated by police officers or traffic control signals.' The provisions of the Traffic act, *supra*, do not of course make the operator of an automobile the insurer of the safety of pedestrians who cross the roadway at a crosswalk; nor do they relieve the pedestrian of the duty of looking out for his own safety as an ordinary prudent person would do in the circumstances; but in the estimate of what ordinary prudence is in the situation here, there must be some consideration given to the law which ordains that the pedestrian crossing at the crosswalk is entitled to the right of way. And so, in looking at all the facts of the case, we are in accord with the learned trial judge that it was for the jury to say whether the defendant was negligent and likewise whether the plaintiff was guilty of negligence that contributed to the accident."

In the case of *Stern v. Stulz-Sickles Co.*, 109 N. J. L. 415, the decedent was a passenger on a bus. The bus stopped at the crosswalk and

decedent alighted, followed by another passenger. He then walked along the crosswalk in front of the bus to get a clear view of the street which he desired to cross. At the point where he cleared the bus, he looked both ways "turning his head". There were no vehicles within the block except the bus from which he had alighted and the defendant's truck which had been following the bus down the street. Having made his observation decedent proceeded slowly to cross the street on the crosswalk, and when he had reached the trolley tracks near the middle of the street, he was struck by the over-hang of defendant's truck which had swung around the standing bus and came on at a speed of thirty-five miles an hour, giving no warning or signal. Although the brakes were applied immediately the truck proceeded sixty feet before it stopped. The defendant's motions for nonsuit and direction of verdict on the grounds that decedent was guilty of contributory negligence as a matter of law were denied by the trial court and on appeal the Court of Errors and Appeals held:

"The law imposed upon him the duty of using due care to observe whether or not people were crossing at this crosswalk at the street intersection, and to use due care to have his truck under such control as not to jeopardize the safety of pedestrians who were using due care in crossing after having alighted from a bus then unloading at such crosswalk. The Supreme Court so held in *Huenegarh v. Kroner*, 1 N. J. L. Mis. R. 113 and in *Newham v. Nazzara*, 107 N. J. L. 208. And this court also held in *Tischler v. Steinholtz*, 99 *Id.* 149.

Also, considering all of the evidence, we think that reasonable men might well have differed upon the question of contributory negligence and therefore that question was properly submitted to the jury. Decedent had

a right to assume that the driver of the truck would exercise proper caution in approaching the street crossing. *Newham v. Nazzara*, 107 N. J. L. 208; *Clarkson v. Ley*, 106 *Id.* 380; *Venghis v. Nathanson*, 101 *Id.* 110; *Tischler v. Steinholtz*, 99 *Id.* 149. As we have pointed out, the decedent alighted from a bus which had stopped at a street intersection to discharge passengers. It was open to the jury to find from the evidence that, while the bus was unloading, he passed in front of the bus to get a clear view of the street and looked both ways. It was open to the jury to infer that he observed the defendant's truck approaching in the rear of the bus, and some distance away, considering its speed. It was also open to the jury to find that, while decedent started to cross he had reason to believe from his observations, and considering the circumstances that he could safely cross, if the driver of defendant's truck exercised reasonable care and respected decedent's rights. If they inferred, as they might, that the decedent honestly misjudged the speed of defendant's truck, they nevertheless could have concluded that she should not be charged with negligence in view of his right to assume that his rights as a foot passenger would be respected by the driver of defendant's truck."

Reconciling the decision of the cases above stated with the facts of the case at bar the following factual situation is disclosed:

James Rizio, Jr., went to the crosswalk of Dover Street and Twentieth Avenue (p. 12, ll. 30-31). He went out into the street at the above mentioned crosswalk and was about four feet in front of the headlight of a parked car and made an observation (p. 12, ll. 32-40; p. 13, ll. 3-10). With him at the time was another playmate, Michael Maloney (p. 15, ll. 18-20). The boy looked first to his left and made an observation (p. 23, ll. 4-6; p. 12, ll. 18-19; p. 21, ll. 26-27; p. 21, ll. 36-38; p.

22, ll. 4-5), and saw no car approaching (p. 12, ll. 18-20; p. 21, ll. 27-28; p. 22, ll. 5-6). This truck was in the intersection of Dover Street and Twentieth Avenue which was the same intersection that the boy intended to cross (p. 22, l. 12). This truck was in the "middle of Dover Street" (p. 22, l. 15) and was about ten feet "down the street" from where the infant was at the crosswalk (p. 22, ll. 16-19; p. 23, ll. 4-5). It was traveling "pretty fast" (p. 22, l. 23). As soon as this truck "went by" the infant plaintiff commenced to "half trot" across the street (p. 22, ll. 26-27).

The fact is uncontradicted that the infant was where he had a lawful right to be—at the crosswalk. The witness, Michael Maloney, corroborates the fact that the infant plaintiff made an observation to the left and right (p. 40, ll. 6-10). Michael Maloney further stated that both he and the infant plaintiff were in the crosswalk, out in the street, about six feet in front of the left headlight of the parked car, when they both made their observations (p. 40, ll. 22-32; p. 41, ll. 18-21). He further stated that he said to the infant plaintiff, "We'll wait until the truck goes by then we'll cross" (p. 40, ll. 9-10), and that the infant plaintiff started to "half trot" across the street (p. 41, ll. 31-32). The testimony of Michael Maloney further discloses that the car was going quite fast; and that he did not hear any horn or brakes; that the infant plaintiff was thrown for 25 to 30 feet and "rolled quite some" (p. 42, ll. 12-15); that when the car owned by the defendant came to a stop the rear end of the car was even with the front end of the parked car (p. 42, ll. 15-20); that he and James Rizio, Jr., were not crouching down but were standing up and if anything were bent over just a little bit (p. 45, ll. 5-10); that the infant plaintiff got to the middle of the street before he was struck (p. 46, ll. 23-24); and that he ob-

served the car of the defendant for about eight feet and it was going fast (p. 47, ll. 27-39).

David Mornick, a witness for the plaintiff at the trial, stated that at the time of the accident he was working on a W. P. A. project in the vicinity of Dover Street and that he saw the automobile of the defendant immediately before it struck the infant plaintiff (p. 59, ll. 21-23) and that the automobile was traveling at a rate of 25 to 30 miles per hour (p. 59, ll. 23-28).

James A. Caspell, who resided in the vicinity of Twentieth Avenue and Dover Street, testified that around four o'clock in the afternoon he was coming up on the left hand side of Twentieth Avenue going west and was about twenty feet from Dover Street when the accident happened. He saw the infant plaintiff standing at the intersection of Dover Street in front of a parked car and saw him making an observation to the left and right (p. 96, ll. 15-20; p. 96, ll. 25-30; p. 102, ll. 18-21; p. 102, ll. 23-38). He then saw the boy start to trot across the street (p. 103, ll. 18-20). Although he did not see the car strike the boy (p. 97, ll. 8-10), he said that the distance between where the defendant's car was and where the boy laid, after the accident was 25 to 30 feet (p. 97, ll. 29-31) and he saw a dent on the left side of the grille (p. 97, ll. 35-40).

William Winterberg, an infant of 14 years of age, at the date of the trial, stated that he was in the seventh grade and a playmate of James Rizio, Jr. Recalling the day of the accident he testified that he went to the scene of the accident and saw skid marks on the road extending from the rear end of the car (p. 117, ll. 17-40) and that the skid marks were about ten feet in length (p. 118, ll. 5-7). These skid marks started from the front of the car and extended to the back of the parked car (p. 118, ll. 9-11). His testimony was that he

saw the skid marks immediately after the accident (p. 118, ll. 9-18).

Testimony further disclosed that the immediate vicinity of the accident was one in which were located apartment houses and dwellings (p. 18, ll. 41-42; p. 19, ll. 1-24).

These facts were sufficient to permit inferences that there was a parked car at the crosswalk of Twentieth Avenue; that the infant plaintiff was at the crosswalk of Twentieth Avenue and Dover Street; that he went out into the crosswalk and stationed himself about four to six feet from the left headlight of the parked car for the purpose of making an observation; that he made a proper observation, having looked first to his left and then to his right; that there were no cars approaching from his left; that there was a truck traveling at a fast rate of speed in the middle of the said intersection; and even though the infant stated that he waited until the truck "went by" and that the boy waited five seconds,—that these five seconds were the infant's conception of time which the truck consumed in passing from a point where the infant first observed it to a point directly in line with the crosswalk at which the infant plaintiff was stationed; that, under the circumstances, the infant had made a proper observation; that the car of the defendant was being operated at a fast rate of speed, to wit, twenty-five to thirty miles per hour; that the left side of the car struck the infant; that the infant was knocked a distance of twenty-five to thirty feet by the impact; that there was a skid mark of ten feet caused by the defendant's car; that defendant did not blow a horn or give any signal when approaching the intersection; that defendant did not lessen the speed of the car when approaching the intersection; that the defendant did not do anything in reference to the control and speed of the car, well

knowing that it was approaching an intersection and well knowing that the crosswalk was partially obscured by a parked car and that a pedestrian might reasonably be at the said crosswalk for the purpose of crossing the said intersection; that the infant plaintiff had the right of way, and consequently, the defendant was under a duty to yield the right of way; and that the defendant's view of the crosswalk was obstructed, and consequently, pursuant to the statute, was under a duty to operate the car at a speed not exceeding fifteen miles an hour, and for the violation thereof, it may permit an inference that the defendant failed to use reasonable care for the protection of those using the highway.

All of the facts recited in the preceding paragraph must be contrasted with the facts which the appellant contends comprise the elements of contributory negligence on the part of the infant plaintiff sufficient to permit the court to take the case from the jury and decide that the infant plaintiff was contributorily negligent as a matter of law. The appellant's contention centers about the fact that the infant's observation "was not reasonably effective and was not even opportune"; that the plaintiff should have "looked again at the end of the five second interval"; that the plaintiff had purposely and intentionally hidden in front of or behind the parked car, and that the infant plaintiff had not selected the crosswalk because of the protection which it afforded him but because of mere chance.

FIRSTLY: Whether the observation was effective or opportune is absolutely a question for the jury. The testimony is abundant that an observation was made to the left and right and that the boy was out in the roadway, four feet to the left of the parked car when he took precaution for

his own safety by looking in both directions for oncoming traffic.

SECONDLY: Since it is a question of fact whether the infant plaintiff had made a proper observation, there is no obligation on his part to make a second observation at the expiration of the five second interval. The jury could infer from the facts that this five second interval was the time consumed by the passing of the truck which was already in the intersection from a point ten feet distance from the infant plaintiff to the crosswalk where the infant plaintiff was stationed.

THIRDLY: There is no evidence that the infant plaintiff was hiding behind the parked car. The evidence is to the contrary,—that he went into the crosswalk and made an observation. In answer to these arguments the testimony discloses that the infant plaintiff was not crouching or hiding behind the parked automobile but was merely a “little bent over”. The infant plaintiff definitely stated that he was standing and the testimony of Michael Maloney and James A. Caspell corroborates this fact.

FOURTHLY: It is immaterial whether the infant plaintiff was at the crosswalk by chance or design. The law does not inquire of the pedestrian the question, “Why are you at a crosswalk?” The crosswalk is there for the protection of the pedestrian using the same. Certainly, the appellant would not urge that a motorist must inquire into the motive of a person at a crosswalk in determining the responsibility and liability of a motorist and a pedestrian and does not involve any mental process on the part of the motorist to determine the reason for the presence of a pedestrian at a crosswalk.

Assuming that there is weight to the contentions of the appellant, these factors, which they urge must be taken into consideration and contrasted with the other elements and facts existing and produced at the trial. If after contrasting the conduct of the plaintiff with the adduced evidence, there can be no question, but that reasonable men can only reach one conclusion, then contributory negligence becomes a matter of law for the court to control. But applying the test and rules of law to the case at bar, there is clearly present an issue of fact, and, consequently, it is for the jury to determine the question of contributory negligence. There is not present, in this case, clear and conclusive proof of contributory negligence to the extent that minds of reasonable men cannot reasonably differ as is enunciated in the case of *Ryan v. Dean*, 114 N. J. L. 199, nor, is there present the elements which satisfy the test as is promulgated in the case of *Poling v. Melee*, 115 N. J. L. 191, in which the court held:

“ ‘To justify such nonsuit the contributory negligence of the plaintiff must clearly appear, conclusively as a fact, or by necessary exclusive inference from the plaintiff’s evidence, and where the evidence, when the plaintiff rests, leaves the question of the plaintiff’s contributory negligence in doubt, the determination of that question must be submitted to the jury.’ *Brewster v. N. Y. Central R. R. Co.*, 80 N. J. L. 447; *Dickinson v. Erie R. R. Co.*, 81 Id. 464; *Anderson v. Public Service Corp.*, *Ibid.* 700; *Napodensky v. West Jersey and Seashore R. R. Co.*, 85 Id. 336; *Work v. Philadelphia Supply Co.*, 95 Id. 193; *Steinberg v. Bogatin Dyers and Cleaners*, 105 Id. 294; *Eggert v. Mutual Grocery Co.*, 111 Id. 502.

The rule is not different upon an application for a directed verdict upon the same ground except that it is to be applied to all

the proofs in the cause and not limited to the proofs upon the part of the plaintiff.

So measured, the proofs clearly demonstrate that the question of contributory negligence was here one requiring submission to the jury and the trial court was not in error in refusing to nonsuit the plaintiffs or direct verdicts against them."

When the testimony of the defendant's operator, John K. Russell and defendant's witnesses are analyzed, then, the question whether the contributory negligence of the infant is a question of fact becomes more pronounced and obvious. Briefly, John K. Russell's testimony and the testimony of the defendant's witnesses disclose that Mr. Russell observed parked cars on his right and also observed children on the sidewalk (p. 121, ll. 29-32); that he was traveling between 20-25 miles per hour (p. 122, ll. 23-24); that he saw the children when he was approximately 185 feet from the intersection of Twentieth Avenue and Dover Street (p. 122, ll. 35-40); that he had a clear view of the intersection for approximately 150 feet (p. 133, ll. 34-36); that as he approached the intersection his view of the sidewalk became obscured and that his view of the boys also became obscured when he was approximately 25-30 feet from the intersection (p. 134, ll. 10-18); that he first saw the boy when he was about 10-12 feet from the crosswalk (p. 135, ll. 17-20; p. 137, ll. 11-15); that the impact occurred at the crosswalk (p. 137, ll. 9-11); that the infant plaintiff was six feet from the curb when he first observed him (p. 137, ll. 31-32); that the infant plaintiff was 18 feet from the curb when the impact occurred (p. 137, ll. 33-37); that the car of the defendant came to a stop approximately 15 feet from the north curb after the impact (p. 138, ll. 7-16); that after Mr. Russell applied the brakes the car traveled approximately 12-15 feet (p. 124, ll. 13-15); that Mr. Molina, a

witness for the defendant and an employee of the Public Service, testified that the defendant's car was being operated at approximately twenty miles an hour (p. 144, ll. 28-32); that there was no change of speed from Martin Street to the intersection where the accident occurred (p. 144, ll. 33-40; p. 145, ll. 7-10); that Mr. Molina first observed the infant plaintiff when the car of the defendant was 12-15 feet west of the crosswalk (p. 148, ll. 27-30); that the infant plaintiff traversed only 3 to 4 feet from a point in front of the parked car before he was struck by defendant's car (p. 148, ll. 31-33); that the witness, Joseph Moore also an employee of the Public Service testified that the car of the defendant was being operated at a rate of speed between 20-25 miles an hour (p. 149, ll. 23-25); that he saw the boys on the sidewalk and watched them "for my own protection" (p. 149, ll. 28-44); that he was interested in watching the boys (p. 153, ll. 5-8); and that, he slowed up as soon as he saw the boys (p. 154, ll. 25-31).

Both the testimony of the infant plaintiff and his witnesses and that of the defendant and their witnesses clearly create a situation where there is no question of any flagrant violation of any duty evolving upon the infant plaintiff, and, to the contrary, creates a situation where any conduct on the part of the defendant must be analyzed with the other testimony of the defendant's negligence and after this process has occurred, the logical conclusion is that a situation of fact has been created wherein the principles of law require that it is within the province of the jury to decide and not for the court to control as a matter of law.

Thus, the trial court properly submitted the question of contributory negligence to the jury and did not commit error in denying defendant's motions for a nonsuit and a direction of verdict.

### B. Discussion of Cases Cited by Appellant.

In the case of *Rich vs. Eldredge*, 106 N. J. L. 181, the infant plaintiff did not make any observation as he passed a car parked around a curb but stepped out into the open space about a foot when he was struck by defendant's car. There was no proof of observation or speed,—the proof being that the car was being operated at a speed of 12-15 miles per hour; or that the car was at an intersection or crosswalk, or any other element present in the case at bar, and, thus, this case is not applicable.

In the case of *Branigan v. Demarest*, 109 N. J. L. 123, which is urged by the appellant, the facts disclose that the bus in which the plaintiff had been a passenger stopped at an intersection to discharge passengers. The plaintiff was either the first or second passenger to alight from the bus. She stepped from the right side and turning to the left, proceeded to cross the street in front of the bus, where the crosswalk would be. She passed in front of the bus, going in a westerly direction. The defendant was operating his car in a northerly direction and was coming from behind the bus on its left while it was standing still. Plaintiff claims that she was looking to her right (north) and when she got to the westerly side of the bus she looked left (south), and as she was looking to the left and stepping at the same time, she was struck by the defendant's passing car. In this case there is no testimony of the plaintiff having made an observation. She made her observation and stepped forward at the same time, consequently, the facts are not similar to the case at bar.

In the case of *Conrad v. Green*, 94 Atl. 390, the plaintiff stepped forward without having made an observation.

In the case of *Egan v. Jersey City H. & P. Street Railway Co.*, 74 N. J. L. 699, which is cited by the appellant, the plaintiff alighted from a trolley car and as the car then proceeded on its way, he walked behind it, intending to cross the track on which cars ran in the other direction, making no observations for his own safety except to "look up"; but the car from which he alighted obstructed his view of the other track, and without waiting for the car to pass, sufficient to allow him to make an observation, he went onto the track and was injured. In this case the plaintiff made no observation whatsoever, and took no precaution for his own safety, but stepped into the path of the oncoming car. He did not use his power of observation to observe the approaching car and to exercise reasonable judgment, when and how to cross without any collision. Thus, no conclusive inference could be drawn from the facts. The only legal inference is that the plaintiff did not perform his duty. Thus, this case is not similar to the case at bar. Likewise, the same situation exists in the case of *Schueler v. North Jersey Railway Co.* (75 N. J. L. 824) where the plaintiff made no observation whatsoever.

In the case of *Bora v. Yellow Cab Co.*, 103 N. J. L. 377, the court decided that the question of contributory negligence was a matter for the jury and not one for the court, and likewise held in the case of *Venghis vs. Nathanson*, 101 N. J. L. 110. In the case of *Trimboli v. Public Service Transport Co.*, 111 N. J. L. 481, plaintiff did not make any observation and was struck as he proceeded into the street.

In the case of *Newman v. Katz*, 112 N. J. L. 49, defendant's truck was being operated at a rate of eight to nine miles an hour at the right hand side of the street, two or three feet from the curb and the traffic light was green indicating to him

“go”. The stop light was against the pedestrians. No one was on the crosswalk as the defendant reached the intersection and as the front part of defendant’s truck was crossing the crosswalk, the plaintiff stepped out to cross, took two or three steps and ran into defendant’s truck. The facts in this case are not in any way similar to the facts of the case at bar. Clearly, in this case, the plaintiff violated all of his duties and there was no testimony of any observation, speed, or any other conduct on the part of the defendant which could spell out “negligence”.

In the case of *Clerici v. Gennari*, 102 N. J. L. 377, the plaintiff ran out into the street without making any observations and was entirely engrossed in his attempt to catch a ball and was running backwards in the street after a batted ball. In the case of *North Jersey Hudson County Railway Co. v. Flanagan*, 57 N. J. L. 696, again the boy ran out into the street without making any observation. At the time of the accident he was running across the street to avoid being hit by a ball which was being thrown at him by a playmate. He ran out into the street without making any observation or without any thought as to any passing cars which might be on the highway at that time.

All of the cases which the appellant has cited to support the contention that the question of contributory negligence in this case was a matter of law, are those in which no observation whatsoever was made by the plaintiff, in fact, they disclose that the plaintiff altogether disregarded his own safety in proceeding across the highway.

## POINT TWO.

**The proof at the close of plaintiff's direct case and also at the end of the entire case contains sufficient facts of defendant's negligence which was the proximate cause of the accident to require the case to be submitted to the jury for its consideration.**

In replying to appellant's contentions in point two of appellant's brief, since practically all of the facts constituting negligence contained in the plaintiff's testimony and defendant's testimony have been discussed in Point One of this brief, appellees will briefly restate the facts comprising negligence on the part of the defendant. The infant plaintiff went to the crosswalk and intended to cross the intersection of Twentieth Avenue and Dover Street; he made an observation to his left and right and this factor is corroborated by two witnesses. As soon as a truck, which was in the middle of the said intersection had proceeded across the intersection, the infant plaintiff commenced to traverse the intersection at a "half-trot". Plaintiff's testimony discloses that the defendant's car was traveling "pretty fast"—to be specific about 25-30 miles an hour; that he did not slow down at the intersection; that his view of the crosswalk was obstructed; that he was operating his car in excess of the speed limit in a residential district; that there was a skid mark of approximately ten feet in length; and that the boy rolled 25 to 30 feet after the impact. That the impact and the distance the boy rolled were of such a nature that the jury had a right to consider them with the rest of the testimony as an element of negligence is enunciated in the case of *Trafford v. Howes*, 115 N. J. L. 557. The court held:

“The jury has a right to consider, in connection with the other evidence, as to speed, the terrific force of the impact and the distance that the decedent’s car was thrown and the parts of it were thrown and the distance that defendant’s automobile proceeded thereafter before it stopped, and to find, where the evidence so considered justifies it, that the latter was being driven at an excessive and negligent rate of speed, in view of the place and circumstances”.

All of these facts were sufficient for the jury to draw a reasonable inference that the defendant did not have proper control of his car; that he disregarded the right of way which the infant had as a pedestrian,—being at a crosswalk; that the defendant violated the traffic act in exceeding the speed limit in a residential district; that he did not slow down to fifteen miles an hour when approaching an intersection where his view was obstructed; that he failed to observe the rights of the infant plaintiff at the crosswalk; that because of his conduct he did not have proper control of the car; that had his speed been lessened, it is probable that the accident could have been avoided because he would have been able to stop his car in time, having testified that he observed the infant plaintiff for a distance of ten to twelve feet prior to the accident; and that no horn or signal was given when the defendant was approaching the intersection.

On the basis of the defendant’s testimony and the witnesses produced at the trial on behalf of the defendant, the jury could very well infer from the testimony that John K. Russell, the operator of defendant’s car, observed the parked cars and observed the children playing on the sidewalk near the crosswalk of Dover and Twentieth Avenue; that he was operating that car at a rate of

speed between 25 to 30 miles an hour and did not at any time lessen his speed as he approached the intersection; that when his view was obstructed for the last 25 feet prior to the accident, he should have had his car under such control so as to permit the possibility or probability that a pedestrian being at the said crosswalk would not be injured; that had his car been under proper control he would have avoided the accident because he saw the infant plaintiff ten to twelve feet before the impact occurred; that he was operating his car at such an excessive rate of speed that a skid mark of ten feet resulted; that he testified that he had a clear view of approximately 185 feet before the accident; that the infant plaintiff traversed twelve feet from the time the defendant saw him until the time of the impact which was the same distance which the car of the defendant traveled from the time Mr. Russell saw the infant and the time of impact; that Mr. Mollina stated that, at no time, did Mr. Russell lessen his speed as he approached the intersection, and, that Mr. Moore, while on the witness stand, disclosed that he saw the boy playing on the sidewalk and in his mind there was such sufficient danger created and the necessity of precaution being exercised that he lessened his speed the moment he observed the boys and in his own words stated, "I was interested watching the boys".

Thus all of the facts above recited were sufficient to permit inferences of negligence which was the proximate cause of the accident and consequently, these were questions of fact which were required to be submitted to the jury for determination.

Consequently, since the proofs in this case were such that the question of contributory negligence was one of fact and not one of law and thus was a question for the jury to determine and, since suf-

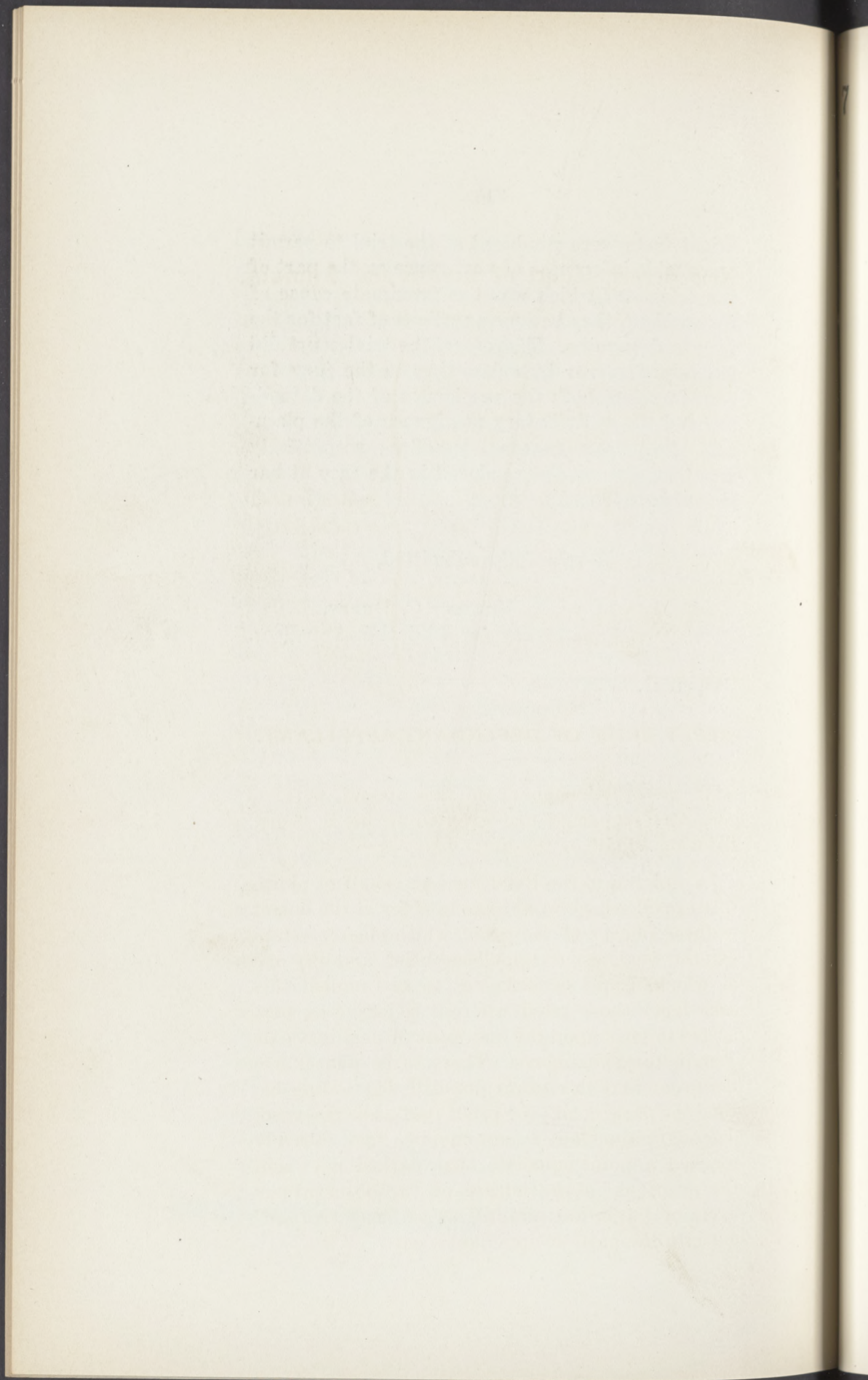
ficient facts were produced at the trial to permit reasonable inferences of negligence on the part of the defendant which was the proximate cause of the accident, they became questions of fact for the jury to determine. Therefore, the trial court did not commit error by submitting to the jury for consideration, both the negligence of the defendant and the contributory negligence of the plaintiff. For these reasons, appellees respectfully urge that the verdict rendered in the case at bar should be affirmed.

Respectfully submitted,

VINCENT C. DUFFY,  
Attorney for Plaintiffs-Appellees.

JOSEPH G. SPROVIERE,  
Of Counsel.

New Jersey State Library



OCT. T. 1941

*Filed by leave of Court*

**New Jersey Court of Errors and Appeals**

No. 7, OCTOBER TERM, 1941.

JAMES RIZIO, JR., an infant by his  
next friend, James Rizio, Sr.,  
and James Rizio, Sr., individu-  
ally,

Plaintiffs-Appellees,

*vs.*

PUBLIC SERVICE ELECTRIC AND GAS  
COMPANY, a corporation of the  
State of New Jersey,  
Defendant-Appellant.

Action at Law.

On Appeal.

**REPLY BRIEF OF DEFENDANT-APPELLANT.**

At the oral argument on this appeal, permis-  
sion was requested and granted to file a Reply  
Brief on behalf of the defendant-appellant.

In replying to the Brief filed on behalf of plain-  
tiffs-appellees, we would like to refer at the outset  
to three phases of the proof which clearly estab-  
lish the weakness of appellees' brief, and any one  
of which would be sufficient to distinguish this  
case from those cited wherein a jury was per-  
mitted to pass upon the questions of negligence or  
contributory negligence. These three phases are  
the proof that the infant plaintiff was hiding be-  
yond the parked car; the proof that as he emerged,  
defendant-appellant's automobile had already  
reached a point opposite that parked car; and  
the proof as to the nature of the observations  
made by the infant plaintiff as he "half-trotted"  
out into the path of appellant's car.

FIRST: Appellees in their brief do not accurately treat with the proof in the case which establishes that the infant plaintiff and his playmate, Michael Maloney, were in fact hiding from the boy, Billy Winterberg. Referring to page 17 of appellees' Brief, where the testimony of Michael Maloney is discussed, it is said that he and the infant plaintiff "were not crouching down but were standing up, and *if anything*, were bent over just a little bit." This appears toward the bottom of page 17 and refers to page 45, lines 5-10 in the State of Case. The actual proof in the case is far more definite than this recital would indicate, for the words "if anything" do not appear in the testimony. Referring further to page 21 of appellees' brief and the paragraph designated as the Third of Four Points made by appellees it is said that:

"There is no evidence that the infant plaintiff was hiding behind the parked car. The evidence is to the contrary,— \* \* \* the testimony discloses that the infant plaintiff was not crouching or hiding behind the parked automobile but was merely a 'little bent over'. The infant plaintiff definitely stated he was standing \* \* \*."

It appears to us that this definitely misstates the evidence.

On page 18 of the state of case starting at line 20 we find the following testimony on cross examination of the infant plaintiff:

"Q. And then you came out from between the houses and went on across Twentieth Avenue? A. Started to cross Twentieth Avenue.

Q. You were going where? A. To get Billy Winterberg.

By the Court:

Q. To get what? A. To get the boy over there, Billy Winterberg.

Q. Billy what? A. Winterberg.

Q. Billy Winterberg? A. Yes.

By Mr. Fryling:

Q. Where was he standing? A. He was standing on Martin Street and Twentieth Avenue, on the opposite side.

Q. That is, back at the corner? A. Yes."

And on page 20 still on cross examination of the infant plaintiff starting at line 17:

"Q. All right. Now, when you came out from between the six-family house and the two-family house did you see Billy across the street then? A. Yes.

Q. He was on that same corner, that is, Martin Street and Twentieth Avenue? A. Yes.

Q. But you turned and walked away from where he was, or ran away from where he was? A. Yes.

Q. When did you decide to go back to him? A. Well, we were going to *hide* behind the car, then cross the street, and then go up and get him.

Q. You were going to hide behind the automobile that was parked there and then you were going to chase Billy on the other side of the street; is that it? A. Yes.

Q. In other words, you were sort of playing a game? A. Yes.

Q. *You didn't want him to see you coming?* A. *No.*

Q. So you hid behind the automobile and then ran across the street and were going to chase him? A. Half trot. We didn't run across."

Further on page 44 on cross examination of plaintiffs' witness, Michael Maloney, beginning at line 27 to page 45, line 33:

"Q. In other words, you had passed two parked automobiles and went up to the third one and got up in front of that and crouched down so that Billy couldn't see you? A. Yes.

Mr. Duffy: He didn't say that, if the Court please.

Mr. Fryling: He just said it now.

The Court: Well, wait a minute. You can't say it unless he did say it.

Mr. Duffy: I have no objection to counsel asking that, but not to put it in his mouth as if the direct examination brought it out.

Q. Were you crouched down in front of this car, hiding from Billy? A. We weren't crouching down; we were standing up.

Q. Standing up perfectly straight? A. Not straight.

Q. Bent over a little bit? A. Yes, just a little bit.

Q. So you were crouched a little bit, so that Billy couldn't see you through that car? A. Yes.

By the Court:

Q. He was on the other side of the street, wasn't he? A. Yes, Billy was.

Q. Billy was on the other side of the street? A. Yes, on the corner.

Q. At the corner of Martin Street? A. Martin and Twentieth.

Q. Martin and Twentieth.

By Mr. Fryling:

Q. Now, just so that we get this straight, that would mean he was across Twentieth Avenue and to your left as you were facing the crossing point? A. Yes.

Q. And that is about a block away?

The Court: Is that a block?

A. Yes, a block away.

Q. It is a full block, but it is a short block. \* \* \*''

Added to this proof there was, of course, the further testimony of the defendant's witnesses, John K. Russell, William Molina and Joseph Moore to the effect that the infant plaintiff was

not visible in the street until he had emerged from behind the parked vehicle.

The two boys having thus concealed themselves from their playmate, William Winterberg, who had been standing on the opposite side of Twentieth Avenue, were necessarily concealed from the view of defendant's driver who was approaching in his car from that same direction. The act of concealment is thus important in determining whether the infant plaintiff was guilty of contributory negligence, and equally important in determining whether or not the defendant was chargeable with negligence.

SECOND: The brief of plaintiffs-appellees makes absolutely no mention of the positive proof in the case to the effect that as the infant plaintiff emerged from his position of concealment, defendant's vehicle had already reached a point opposite the parked automobile. Plaintiffs' witness, David Mornick, testified that as the boy ran from behind the parked car defendant's vehicle was seven feet away (State of Case, p. 62, ll. 37 to 40). Defendant's witness, John K. Russell, testified that when the front of appellant's car was even with the rear of the parked car, the infant plaintiff ran out (p. 123, ll. 10-17). The defendant's witness, William Molina, testified that when the boy ran out from behind the parked car he was 15 feet in front of appellant's car (p. 141, ll. 11-15).

As against this proof submitted on both plaintiffs' and defendant's cases there was nothing contradictory to raise a fact issue. This point also, it seems to us, is of the utmost importance in measuring the conduct of the infant plaintiff and of appellant's employee.

THIRD: Analyzing the argument made in the brief of plaintiffs-appellees as a whole, it seems

to be based largely upon the theory that since the infant plaintiff had looked first to his left and saw nothing, and then to his right and seeing a truck, waited five seconds, and then half trotted out across the street, he made the observation required by law and therefore, was not chargeable with contributory negligence. Appellees seem to assume that a mere observation, and nothing else, is required of a pedestrian attempting to cross a highway. This thought runs throughout the recital of facts as set forth in appellees' brief (pp. 19-20), and as further expressed at the bottom of page 20 in what appears to be the first of four points made by appellees. The thought also appears from the criticism, as set forth beginning at page 25 in appellees' brief, of the cases cited in appellant's brief. Referring to *Branigan v. Demarest*, 109 N. J. L. 123, and *Conrad v. Green*, 94 Atl. 390, appellees complained that those cases involve situations where pedestrians had made no observations. This is not true, whereas in both of those decisions, and appellant cited them for this reason, the court granted non-suits, which were sustained on appeal, on the theory that the observations as made were not "reasonably effective." The rule as expressed in both of those decisions, in identical language, was quoted in full by appellant at page 20 of appellant's brief.

Plaintiffs-appellees on page 26 make the same criticism of *Egan v. Jersey City H. & P. Street Railway Co.*, 74 N. J. L. 699, and *Schueler v. North Jersey Railway Co.*, 75 N. J. L. 824. These cases are discussed in appellant's brief on pages 20 and 22 respectively, and are cited as authority for the proposition that the pedestrian is required to make reasonably effective observation at an opportune time, that is, when he could see beyond an obstruction to his view. The rules of law as

expressed in these decisions are definitely applicable to the case at bar, especially when considered along with the proof in the case that appellant's car, as the infant plaintiff emerged, was already abreast of the parked car.

Aside from these three points appellees' brief is subject to further criticism on points of lesser importance. The brief starts off on page 4 with the statement of the rule that, generally speaking, the question of contributory negligence is usually one for a jury. This same thought is expressed at the bottom of page 16 of appellant's brief. Appellees then go on to state that a different degree of care is required in the case of an infant, as is acknowledged at the top of page 17 of appellant's brief. Appellees then cite *Rinaldi v. Levgard Structural Co.*, 97 N. J. L. 162, where contributory negligence of a six-year-old child was held to be a question for the jury. Appellees also cite *Mancino v. Ubaniak*, 120 N. J. L. 424, which involves an infant seven years and three months of age who was crossing a public street. On page 6 of appellees' brief, they attempt to show that the facts of that case are comparable to those in the case at bar, but appellees overlooked the difference in the ages of the infants, the fact that in the *Mancino* case the infant crossing a street was walking; that there was nothing to obstruct the infant's view, or the view of the defendant's driver, and, of course, the further fact that the infant had not been concealing himself from the view of defendant's driver as in the case at bar. A further and most important difference is that in the *Mancino* case, the infant made his observations and started to cross the street when the car was still a block away, and the Court's opinion, a part of which is quoted on page 7 of appellees' brief, discloses how much importance the appel-

late court attached to that fact. The quotation on page 7 of appellees' brief sets forth in the second sentence:

“We have pointed out that the evidence tended to show that the infant child, before he started to cross the street looked in the direction from which the defendant was coming and saw no car.”

Appellees omitted the balance of that sentence as it appears in the decision, which is as follows: “\* \* \* and that may well have been precisely so considering the speed of the car.” The Court held, in effect, that since defendant's vehicle was a block away, the infant might not be required to make an observation extending that far since he could assume that defendant would not be traveling at 35 to 40 miles per hour, as was proven.

Appellees cite on page 5, *David vs. West Jersey &c. Seashore Railway Co.*, 84 N. J. L. 685, which is also cited in appellant's brief on page 26. Appellees cite the case as authority for the proposition that contributory negligence of an infant is a jury question and the brief quotes a part of the decision of the Court, setting forth the measure of care required of an infant. Appellees' quotation ends with the sentence, “\* \* \* it is usually a question for the jury to determine whether the child has been guilty of contributory negligence”. Immediately following that sentence in the decision (84 N. J. L. at page 688), and omitted from appellees' quotation, we find the following sentence: “No doubt, where it appears beyond dispute that the child acted in entire disregard of the degree of prudence which may reasonably be expected of one of his years, and thereby contributes to his injury, then the question, contrary to the usual rule, becomes one for the court to determine”.

In the part of the decision in the *David* case quoted in appellees' brief on pages 5 and 6, we find the reason for measuring the degree of care required of a child differently than that required of an adult. The Court points out, and this appears in the quotation at the top of page 6 in appellees' brief, that thoughtlessness, impulsiveness and indifference to danger are natural traits of children, and hence the different measure of the duty of care. This very thought is expressed on page 31 of appellant's brief where it is pointed out that the infant plaintiff testified that he looked left and then right and that he waited for the truck to pass, thus disclosing his capacity to understand the situation and his appreciation of the danger, and further that the infant plaintiff on reaching Twentieth Avenue determined to chase his playmate, Billy Winterberg, and in pursuance of that determination, he rushed to his right or east along Twentieth Avenue, then concealed himself behind a parked car, and then started across the street. This is not such thoughtlessness, impulsiveness and indifference to danger as might excuse the infant plaintiff from being chargeable with contributory negligence.

On page 7 in appellees' brief, *Eastmond v. Wachstein*, 4 N. J. Miscel. 966 is cited. This case was on rule to show cause for a new trial and involved an infant eight years and six months of age. This case is readily distinguishable from the case at bar in that the infant, though running across a public highway, had almost crossed the same and was but a few feet from the far sidewalk. This case cannot be compared to the case at bar where the infant plaintiff, older in years, emerged from a place of concealment while appellant's car was but a car's length or fifteen feet away.

On page 10 of their brief, appellees cite *Scott-Huntington v. Pearson*, 11 N. J. Misc. 642, which

was on defendant's rule to show cause for a new trial, where a ten-year-old boy ran into the street and stood there while defendant's car, according to defendant's own proof, was still 100 feet distant and travelling at forty miles per hour.

Appellees cite on page 12, *Powers vs. Standard Oil Co.*, 98 N. J. L. 730, a decision, which was also cited by appellant. It should be noted, however, that the appellant cited the case for two propositions; first, on page 11 of appellant's brief, as authority for the proposition that it made no difference whether the parked car, beyond which the infant plaintiff in the case at bar had concealed himself, was facing with its front to the east or to the west; and secondly, (on p. 11), as authority for the rule that the presence of a parked car would exaggerate and enlarge the duty of care required of the infant plaintiff and of appellant's driver in the case at bar. Such were the holdings in the *Powers* case.

Appellant cites the *Powers* case as authority for his contention that a jury question was presented. The *Powers* case, however, concerns itself only with the rights and duties as existing between the infant plaintiff and the owner of the parked vehicle, and does not even discuss the conduct of the driver of the vehicle which struck that plaintiff.

Appellees also cite at page 13 in their brief, *Volpe v. Perruzzi*, 123 N. J. L. 323, where a pedestrian walking across a crosswalk with a group of other pedestrians was struck by defendant's car. This case is in no respect similar to the case at bar where the infant plaintiff, emerging from the place of concealment, ran or half trotted into the path of a vehicle which was but a car's length away as he did so.

Appellees cite and discuss in their brief on pages 14 to 16, *Stern v. Stulz-Sickles Co.*, 109 N.

J. L. 415, where contributory negligence was held to be a jury question. As mentioned by the Court in its decision, and as quoted on page 16 of appellees' brief, it was open to the jury to infer that the plaintiff, before emerging from behind a bus, made an observation and saw defendant's vehicle at such a distance away that he could justifiably assume it was safe for him to proceed. In the case at bar the only proof is that appellant's vehicle was within a car's length away so that the infant plaintiff should have seen it, and if he did, must have known that he could not possibly proceed with safety. The cases therefore are in no respect similar.

Considering the rules of law and the factual situations to which they are applied in all of the cases cited, both in appellant's brief and in appellees' brief, and particularly considering the fact that the infant plaintiff had been hiding, that he emerged when appellant's car was less than a car's length away, and the fact that the observations as made by the infant plaintiff were obviously ineffective, it would seem that jury questions had not been presented on the question of plaintiffs' contributory negligence or defendant's negligence. For these reasons, as urged in appellant's original brief, the judgments in favor of the plaintiffs-appellees should be reversed, and since all of the available proof is before this court, judgment should be entered in favor of appellant.

Respectfully submitted,

HENRY H. FRYLING,  
Attorney for and of Counsel  
with Appellant.

WILLIAM H. SPEER,  
RICHARD FRYLING,  
Of Counsel.

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