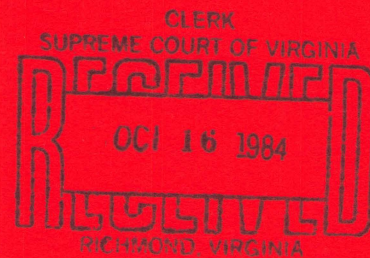


233Va 140



IN THE  
SUPREME COURT OF VIRGINIA  
AT RICHMOND

WASHINGTON & LEE  
LAW LIBRARY

JAMES L. DEWALD,

MAY 18 1987

Appellant,

v.

RECORD NO. 831759

JAMES C. KING,

Appellee.

---

A P P E N D I X

---

WILLIAM D. BREIT

Of Counsel

BREIT, RUTTER & MONTAGNA  
720 Atlantic National Bank Building  
415 St. Paul's Boulevard  
Norfolk, Virginia 23510

Counsel for Appellant



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VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF NORFOLK

JAMES L. DEWALD,

Plaintiff,

v.

AT LAW NO. 82-411

JAMES C. KING  
2832 Fabian Avenue  
Norfolk, Virginia 23504

PLAINTIFF DEMANDS A TRIAL  
BY JURY

AND

SELECTED RISKS INSURANCE COMPANY  
Serve: Louis Koutoulakos,  
Registered Agent  
200 Southern Building  
Arlington, Virginia

MOTION FOR JUDGMENT

TAKE NOTICE that the undersigned hereby moves the Circuit Court of the City of Norfolk at the Courthouse thereof for a judgment and award against you in the sum of FIFTY THOUSAND (\$50,000.00) DOLLARS, with interest and costs incident thereto, to-wit:

1. That on the 8th day of March, 1980, James L. Dewald was lawfully standing at 2515 Tidewater Drive in the City of Norfolk, Virginia.
2. That at the time and place aforesaid, James C. King was operating a car at or near 2515 Tidewater Drive, Norfolk, Virginia.
3. That at that time the defendant did carelessly and negligently operate his motor vehicle and the same was caused to strike the plaintiff causing him to sustain serious and permanent injury.
4. That these injuries to the plaintiff and the shock resulting therefrom have caused and are continuing to cause and will in the future cause to the plaintiff great pain and suffering, both mental and physical; said injuries have required plaintiff to have medical treatment and to expend large sums of money for doctors and medical treatment; said injuries are continuing to cause and will in the future

cause plaintiff to expend large sums of money to effect a cure. Some of said injuries will have a permanent effect upon the plaintiff and have caused him to be sick, sore, lame, disfigured and disabled for a long time and probably for the rest of his life he will continue to be maimed and disfigured and will suffer great physical pain and mental anguish. The plaintiff has also been caused to lose time from work and engaging in any productive occupation and has suffered and will continue to suffer loss of earnings. The said injuries will continue to permanently disable him from all other activities formerly associated with his person and station in life.

WHEREFORE, plaintiff moves this Court for an award and judgment against you in the sum of FIFTY THOUSAND (\$50,000.00) DOLLARS, with interest as provided in the Code of Virginia, Section 8.01-382, together with costs as aforesaid.

JAMES L. DEWALD

By \_\_\_\_\_  
Of Counsel

William D. Breit, Esquire  
BREIT, RUTTER & MONTAGNA  
720 Atlantic National Bank Bldg.  
415 St. Paul's Blvd.  
Norfolk, VA 23510

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF NORFOLK

JAMES L. DEWALD,

Plaintiff,

v.

AT LAW NO. L82-411

JAMES C. KING

and

SELECTED RISKS INSURANCE COMPANY,

Defendants.

ANSWER AND GROUNDS OF DEFENSE

Now comes the defendant, James C. King, by counsel, who files the following Answer and Grounds of Defense to the Motion for Judgment filed herein by the plaintiff:

1. Defendant neither admits nor denies the allegations in paragraph 1, not having sufficient knowledge of same, and calls for strict proof thereof.

2. The allegations in paragraph 2 are admitted.

3. The allegations in paragraph 3 are denied, and this defendant expressly denies that he did carelessly and negligently operate his motor vehicle causing same to strike the plaintiff, and causing the plaintiff to sustain serious and permanent injury.

4. The allegations in paragraph 4 are denied.

5. Defendant denies that the plaintiff is entitled to recover from him in this action or in any other action the sum of fifty thousand dollars (\$50,000), or any other sum.

6. Defendant states affirmatively that the plaintiff herein was guilty of contributory negligence and assumption of risk, and defendant reserves the right to amend his Answer and Grounds of Defense or to rely upon any defense which may be or become available to him whether before or during trial hereof.

LAW OFFICES  
TAYSS & FLETCHER, P.C.  
ROYSTER BUILDING  
NORFOLK, VIRGINIA

JAMES C. KING

By

*B. Thomas Reed*  
Of Counsel

B. Thomas Reed  
TAVSS & FLETCHER, P.C.  
Suite 100, Royster Building  
Two Commercial Place  
Norfolk, Virginia 23510

CERTIFICATE

I hereby certify that I mailed a true copy of the foregoing Answer and Grounds of Defense to Robert G. Winters, Esquire, Reynolds, Smith & Winters, Post Office Box 3668, Norfolk, Virginia 23514, and to William D. Breit, Esquire, Breit, Rutter & Montagna, 720 Atlantic National Bank Building, 415 St. Paul's Boulevard, Norfolk, Virginia 23510, this 11<sup>th</sup> day of March, 1982.

B. Thomas Reed

B. Thomas Reed

9

INSTRUCTION NO.

If you find your verdict for the plaintiff, then in determining the damages to which he is entitled, you may consider any of the following which you believe by the greater weight of the evidence was caused by the negligence of the defendant:

1. any bodily injuries he sustained and their effect on his health according to their degree and probable duration;

2. any physical pain and mental anguish he suffered in the past and any that he may be reasonably expected to suffer in the future;

3. any disfigurement ~~and any associated humiliation or embarrassment;~~

~~4. any inconvenience caused in the past~~

✓ 5. any medical expenses incurred in the past

✓ 6. any earnings he lost because he was unable to work.

Your verdict should be for such sum as will fully and fairly compensate the plaintiff for the damages sustained as a result of the defendant's negligence.

VIRGINIA:

In the Circuit Court of the City of Norfolk.

JAMES L. DEWALD

Plaintiff

v.

Docket No. L-82-411

JAMES C. KING

Defendant

VERDICT

WE, THE JURY, ON THE ISSUES JOINED FIND IN FAVOR  
OF THE PLAINTIFF AND ASSESS HIS DAMAGES AT \$4,500.00  
(Hospital bills of \$2,629.27) (Rounded) ↑  
(2 months lost wages 1,120.00)

~~WE, THE JURY, ON THE ISSUES JOINED FIND IN FAVOR  
OF THE DEFENDANT.~~

Robert E. Caudeman

FOREMAN



Virginia:

In the Circuit Court of the City of Norfolk, on the 27th day  
of April, in the year 19 83

JAMES L. DEWALD  
VS AT LAW L82-411  
JAMES C. KING

PLAINTIFF

DEFENDANT

ORDER

This day came again the parties, in person, and by counsel, and came again the same Jury heretofore impaneled and sworn pursuant to adjournment on the 26th day of April, 1983.

Thereupon, at the conclusion of the Plaintiff's evidence, and again at the conclusion of all the evidence, the Defendant, by counsel, moved the Court to strike the Plaintiff's evidence and to enter summary judgment in his behalf, which motion, after having been fully heard and maturely considered by the Court, is overruled, to which action of the Court, the Defendant, by counsel, notes his exception.

Whereupon, at the conclusion of all the evidence, the Plaintiff, by counsel, moved the Court to strike the Defendant's evidence and to submit to the Jury the question of damages only, which motion, after having been fully heard and maturely considered by the Court, is overruled, to which action of the Court, the Plaintiff, by counsel, notes his exception.

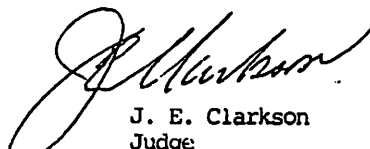
Now the Jury, having heard all the evidence and arguments of the parties, by counsel, retired to their Chamber to consider their verdict, and, after some time, returned into Court with a verdict in the following words and figures: "We, the jury, on the issues joined find in favor of the Plaintiff and assess his damages at \$4,500.00 (Hospital bills of \$3,629.27 - 2 months lost wages \$1,120.00) (rounded)".

Whereupon, after the Jury verdict, the Court polled the Jury as to their said verdict, to which said poll the Jury replied that the verdict herein reported was his or her said verdict.

Thereupon, after the Jury was polled, the Plaintiff, by counsel, moved the Court to set aside the Jury verdict on the grounds that it is contrary to the law and the evidence and inadequate and to grant him a new trial on damages, whereupon, the Defendant, by counsel, moved the Court to set aside the Jury verdict as being contrary to the law and the evidence, and both these motions are under advisement.

Thereupon, this case is continued generally.

Office of  
WILLIAM L. STOVALL  
Clerk of the  
Circuit Court  
Norfolk, Virginia

  
J. E. Clarkson  
Judge

A COPY OF THIS ORDER IS TO BE FILED WITH THE CLERK

May 2, 1983

The Honorable John E. Clarkson  
Judge, Norfolk Circuit Court  
100 St. Paul's Boulevard  
Norfolk, Virginia 23510

Re: James DeWald v. James C. King  
Law No. L-82-411

Dear Judge Clarkson:

Plaintiff, by counsel, submits this letter in support of his Motion for a new trial on damages based upon the jury's verdict in the amount of \$4,500.00 which was clearly contrary to the law and the evidence. After hearing the evidence on April 26, 1983, the jury returned a verdict in the amount of \$4,500.00 and itemized their findings on damages as follows: \$3,629.27 in medical bills and \$1,120.00 in lost wages. Even though the total was in excess of \$4,500.00, the award was rounded off to the lower figure and a verdict in the amount of \$4,500.00 was returned. This action by the jury was clearly erroneous and requires this Court to award a new trial on the issue of damages.

Section 8.01-383 of the Code of Virginia, 1950, as amended, specifically provides that a new trial may be granted where damages awarded are too small. This authority is clearly required when the jury fails to take into consideration all proper elements of damage to which the plaintiff is entitled supported by the evidence.

"In Virginia, the courts are clothed with the authority, and charged with the duty, to correct what plainly appears to be an unfair verdict in a personal injury case. The use of this authority is but the exercise of the inherent discretion of the trial courts, limited by the admonitory principle that it is the jury's function, ordinarily, to assess damages." Gail Yeatts Murphy v. Virginia Carolina Freight Lines, Incorporated, 215 Va. 770, 213 S.E.2d 769.

In this action the plaintiff was awarded damages only for medical bills and lost wages. The jury failed to take into consideration any other element of damage as set forth in Instruction Number 9.

The leading authority for the proposition that a new trial should be granted when a jury's verdict is inadequate is the case of Rome v. Kelly Springfield, 217 Va. 943, 234 S.E.2d 277 (1977). In that case a jury returned a verdict in the exact amount of the plaintiff's lost wages and medical expenses as shown by the evidence. The Court held in that case;

"The jury's award appears to represent only two of those seven elements. Substantial evidence was introduced in support of the other elements of damage mentioned in the instruction, viz., past and future physical pain and mental anguish, disfigurement and deformity, past and future inconvenience, future medical expenses, and the effect of such injuries upon Rome's health. The verdict is therefore inadequate and invalid as a matter of law because it demonstrates the jury has disregarded the instruction on damages. Obviously, the jury has failed to take into consideration all the proper elements of damages to which the plaintiff was entitled under the evidence."

Likewise, in this action the jury failed to take into consideration plaintiff's damages which were amply supported by the evidence. Plaintiff suffered two broken legs, was hospitalized for three weeks, had stitches to his head and face, had permanent scarring, and suffered extreme pain and mental anguish throughout his rehabilitation. The jury totally failed to take into consideration any of these elements of damage to which plaintiff was entitled under the evidence.

In the recent case of May v. Leach, 220 Va. 472 (1979) the Court refused to grant a new trial on damages even though the plaintiff's specials were in excess of the jury verdict. The Court held citing the case of Brown v. Huttleston, 213 Va. 146, 191 S.E.2d 234 (1972) that

"From the evidence, the jury was entitled to find that the plaintiff had not been injured as seriously as she claimed. The jury was also justified in believing that only a portion of the special damages was reasonably related to the accident. This being so, the verdict cannot be disturbed

on the ground that it was inadequate."  
May v. Leach, 220 Va. at 474.

This argument is not supported in this action because there was no question as to which elements of damage the jury considered in returning its verdict. Not only did they itemize the damage but they reduced that sum and rounded it off to a lower figure, failing to even compensate the plaintiff for those elements of damage to which the jury properly considered and itemized. Having found the exact amount of the medical bills related to the accident and a reasonable sum for lost wages, the jury has specifically limited the elements of its award, and failed to consider any of the other elements of damage amply supported by the evidence.

Because the jury failed to properly consider all the proper elements of damage to which the plaintiff was entitled by an overwhelming weight of the evidence, the verdict should be set aside and a new trial ordered on the issue of damages.

Respectfully submitted,

William D. Breit

WDB/jc

cc: Mark L. Earley, Esquire  
Robert G. Winters, Esquire

COPY

LAW OFFICES  
TAVSS & FLETCHER, P. C.  
ROYSTER BUILDING  
TWO COMMERCIAL PLACE  
NORFOLK, VIRGINIA 23510-3747

RICHARD J. TAVSS  
JOHN R. FLETCHER  
ROY B. MARTIN, III  
MARK L. EARLEY

(804) 625-1214

REPLY TO:  
POST OFFICE BOX 3747  
NORFOLK, VIRGINIA 23514

May 17, 1983

The Honorable John E. Clarkson  
Norfolk Circuit Court  
100 St. Paul's Boulevard  
Norfolk, VA 23510

Re: James Dewald v. James C. King  
At Law No. L82-411

Dear Judge Clarkson:

The defendant, James C. King, by counsel, submits this letter in opposition to plaintiff's letter of May 2, 1983, regarding plaintiff's motion to set aside the verdict and grant plaintiff a new trial on the issue of damages alone.

GENERAL RULE IN VIRGINIA

In Virginia, the general rule is that the verdict of a jury, which has been properly instructed and has heard competent evidence, is "inviolable against disturbance by the Court." See Smithey v. Sinclair Refining Company, 203 Va. 142, 145; 122 S.E.2d 872, 875 (1961) and Murphy v. Virginia-Carolina Freight Lines, Inc., 215 Va. 770; 213 S.E.2d 769, 773 (1975). Further, "where an impartial jury properly instructed has determined the issue of damages in a personal injury case, the verdict should not be disturbed if it is supported by a logical interpretation of the factual issues." Doe v. West, 222 Va. 440 (1981).

The Court can, however, in its discretion, set such a jury verdict aside on rare occasions. The most common reason prompting the Court to set aside a jury verdict is an award of excessive damages. Indeed the adage that the jury should be just before being generous is usually alleged to have been applied in reverse. 5B Michies



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The Honorable John E. Clarkson  
May 17, 1983  
Page Two

Jurisprudence of Virginia and West Virginia, Damages  
\$56 (1976 Replacement Volume). However, the Court is  
called upon at times to consider setting aside a jury  
verdict on the basis that damages are inadequate. Such  
is the plaintiff's motion in the instant case of Dewald  
v. King. In such cases, the courts in Virginia have  
ruled that a verdict cannot be disturbed unless, in  
light of all the evidence, the award be so manifestly  
inadequate as to show very plainly that the verdict  
resulted from a misconception or misinterpretation of  
the facts which should have guided the jury to a just  
verdict. Dinwiddie v. Hamilton, 201 Va. 348,  
111 S.E.2d 275 (1959); Dalton v. Johnson, 204 Va. 102,  
129 S.E.2d 647 (1963).

SIMILAR MOTION TO SET ASIDE  
JURY VERDICT AND THE SUPREME COURT'S RULING

A motion similar to the plaintiff's motion now  
under consideration was made and denied in the case of  
May v. Leach, 220 Va. 472, 260 S.E.2d 456 (1979).

In May v. Leach, the jury returned a verdict in  
favor of the plaintiff in the sum of \$1,323.76 which  
was \$.30 less than the special damages proved by the  
plaintiff as follows:

\$ 217.34--Medical Expenses  
716.72--Loss of Earnings  
390.00--Property Damage

\$1,324.06--Total

The plaintiff in May, sought reversal of the case  
with a new trial on the issue of damages because he  
felt the verdict inadequate. The plaintiff asserted  
that it was obvious that the jury failed to consider  
compensation for pain and suffering and other items of  
damage it was instructed to consider. Therefore, the  
plaintiff felt that there was misconduct on the part  
of the jury and inadequacy of damages as a matter of  
law.

In May, the plaintiff relied on the case of Rome  
v. Kelly Springfield, 217 Va. 943, 234 S.E.2d 277 (1977).

TAVSS & FLETCHER, P. C.

The Honorable John E. Clarkson  
May 17, 1983  
Page Three

Rome is the same case that the plaintiff in the instant case of Dewald v. King refers to as "the leading authority for the proposition that a new trial should be granted when a jury verdict is inadequate." (See Plaintiff's Memorandum Brief of May 2, 1983, page 2). In Rome, the jury awarded a verdict in favor of the plaintiff in the exact amount of his lost earnings and medical expenses--\$79,918.52. The medical expenses and lost earnings were proven by uncontroverted evidence during the trial.

Responding to the plaintiff's reliance on Rome in the May case, the Court commented on and interpreted the decision it made in Rome. The Court said that in Rome they determined the verdict to be "inadequate and invalid as a matter of law, because in light of the undisputed evidence as to the special damages and the substantial evidence of the plaintiff's injuries, the verdict demonstrated that the jury had failed to take into consideration all of the proper elements of damages to which the plaintiff was entitled." May v. Leach, 220 Va. 472, 474 (1979).

The Court distinguished May from Rome by saying that in May the record lacked the kind of substantial evidence of the seriousness of the plaintiff's injuries found in Rome, and further that the record raised serious questions regarding the time lost from work and the amount spent for medical expenses. Applying the same rationale as had been applied in Brown v. Huddleston, 213 Va. 146, 191 S.E.2d 234 (1972), the Court in May found for the defendant and affirmed the trial court's approval of the verdict by saying: "from the evidence, the jury was entitled to find that the plaintiff had not been injured as seriously as she claimed. The jury was also justified in believing that only a portion of the special damages were reasonably related to the accident. This being so, the verdict cannot be disturbed on the ground that it was inadequate."

The Honorable John E. Clarkson  
May 17, 1983  
Page Four

THE RATIONALE OF THE COURT IN  
MAY v. LEACH APPLIES IN DEWALD v. KING

Because Dewald can and should be distinguished from Rome for the same reasons that May was distinguished from Rome, the same rationale applied by the Court in May should be applied in the instant case of Dewald.

First, in the instant case, the evidence regarding the cause and severity of the plaintiff's injuries was questionable and contradictory, falling far short of the "substantial evidence" that existed in Rome. In the trial of the instant case, the jury heard evidence from the doctor and the plaintiff to the effect that it was four to five days after the accident when the plaintiff went to the hospital complaining of pain and swelling in his leg. Although the plaintiff stated that he complained of some leg pain when he went to the hospital the day of the accident, it was not his major complaint as was evidenced by the fact that no x-rays were taken of either of the plaintiff's legs that day. It was only four to five days later when he returned that x-rays were taken and then the x-rays only revealed hairline fractures.

In addition, it is important to note that throughout the trial serious questions were raised as to whether or not the plaintiff, Dewald, was ever even struck by the automobile of the defendant. The plaintiff's own statement was simply that he "assumed" he had been struck by the automobile. There was no certainty on his part, nor on the part of Mr. Owens who was standing next to him at the time of the accident. Adding to the fact that the plaintiff could not actually say he was hit by the defendant's automobile and the fact that he complained of his "broken" legs days after the accident, was the evidence before the jury of the plaintiff's chronic alcoholism as diagnosed by Dr. Devereaux. With this kind of questionable evidence, it must be remembered that the jury considered Instruction No. 15, which read in part as follows: "...and if the jury are uncertain as to whether any particular item of damage claimed was

The Honorable John E. Clarkson  
May 17, 1983  
Page Five

caused by the collision, or if it appears just as probable that any injury or element of damage complained of resulted from a cause other than the collision, then the plaintiff cannot recover for such injury or element of damage."

It is obvious therefore, that the instant case of Dewald v. King has a factual situation and an evidentiary situation much more closely akin to that of May v. Leach than Rome v. Kelly Springfield. The contradictions in the evidence and the weakness and/or lack of evidence on certain key issues make Dewald and May similar and therefore set them both apart and distinguish them from Rome.

Second, there were serious questions raised in Dewald v. King concerning how much time the plaintiff lost from work and for what reason. The plaintiff testified he did not return to work until after January, 1981, which would have been at least nine months after the accident. He did not have any idea of the exact date, and there was no attempt by the plaintiff to call his employer to substantiate time lost from work. Since there was no documentary evidence as to how much time the plaintiff lost from work, and since the only evidence of such was the plaintiff's testimony, the jury was certainly entitled to take into consideration the plaintiff's credibility pursuant to Instruction No. 11, which gave the jury the right to judge the credibility of the witnesses.

Also, the doctor who testified said the plaintiff should have been normal within twelve weeks of the accident, allowing six weeks for disability and six weeks for weakness in his legs. Not only was there such contradictory evidence from the plaintiff and the doctor regarding time lost from work, but the jury had the additional evidence of the plaintiff's chronic alcoholism, and was entitled to and in all probability did take such a condition into consideration as affecting the recovery time and hence, the amount of time lost from work that would have been attributable solely to the leg injuries.

Also, in Dewald v. King there are serious questions raised concerning the amount spent for medical expenses.

The Honorable John E. Clarkson

May 17, 1983

Page Six

The jury had ample evidence before it to conclude that the medical bills incurred by the plaintiff would not have been as high were it not for the plaintiff's alcoholism. Dr. Devereaux stated that although the plaintiff was admitted to the hospital for leg injuries, he was also diagnosed at the time of admittance as a chronic alcoholic and was admitted as such. Dr. Devereaux also admitted that the plaintiff underwent treatment in the hospital for his alcoholism by attending alcohol education classes. He further stated, although somewhat reluctantly, that a patient who was a chronic alcoholic would be affected in his recovery time due to his lessened vitality and his reduced ability to recover from illness.

Finally, the most recent case in Virginia on the subject of setting aside a verdict for inadequate damages is Doe v. West, 222 Va. 440 (1981). In Doe, the plaintiff obtained a jury verdict of \$2,800.00 for personal injuries sustained in an automobile accident. The plaintiff had a fractured collarbone, with a bump on his shoulder caused by "overriding" when the fracture healed. The plaintiff testified that this bump caused him embarrassment. Doctors testified that he would have a 10% permanent disability and that he should be able to return to work within twelve to fourteen weeks. The evidence was that the plaintiff earned \$200.00 per week.

The trial court in Doe ruled as a matter of law that the plaintiff was entitled to recover and submitted the case to the jury on the issue of damages alone. When the jury only awarded \$2,800.00, the trial court set aside the verdict as inadequate and granted a new trial on damages alone. The Supreme Court reversed that ruling and let the jury verdict stand.

As in May, the plaintiff in Doe relied unsuccessfully on the case of Rome. The court again distinguished Rome by commenting that the verdict in Rome could not be reconciled with any logical interpretation of the evidence as to damages. But in Doe, the court said there was contradictory evidence as to the severity of the plaintiff's injuries and the amount of actual monetary loss resulting from the accident.



TAVSS &amp; FLETCHER, P. C.

The Honorable John E. Clarkson  
May 17, 1983  
Page Seven

In sum, Virginia law has clearly established through the Rome, May, Brown and Doe cases that a jury verdict will not be set aside for inadequate damages when there is conflicting evidence with regard to the seriousness of the injuries, the amount of medical expenses, and the amount of lost wages. There was conflicting evidence on all of those issues in the instant case of Dewald v. King.

DID THE JURY FAIL TO TAKE INTO  
CONSIDERATION THE ELEMENTS OF PAIN AND SUFFERING?

The plaintiff asserts in his Memorandum Brief of May 2, 1983, that the jury verdict should be set aside because the jury failed to take into consideration the elements of pain and suffering. Quite the contrary, the evidence before the Court is not that the jury failed to take into consideration the elements of pain and suffering, but that the jury failed to itemize the award explicitly, feeling that the award which they itemized as medical expenses and lost wages included monies adequate enough to award the plaintiff for pain and suffering. The jury simply failed to believe the plaintiff's testimony regarding the extent of his pain and suffering. For instance, the plaintiff commented about the scar, which was located on his cheek, and its effects on him. The plaintiff's strongest comment was that it caused him some embarrassment and made him feel a bit uncomfortable when he looked in the mirror in the mornings. It is even questionable as to whether or not the scar was visible to the jurors from the jury stand.

In addition, the jury most probably found his comments about the pain and suffering caused by his leg injuries quite exaggerated. Here was a man talking about broken legs, who had only discovered there was a problem with his legs four to five days after the accident. In addition, the injury did not require any kind of casting as is normally the case with broken bones, and was characterized by the doctor as a hairline fracture. Remembering that the jury was instructed in Instruction No. 11 that it had the right to judge the credibility of the witnesses, it is

LAW OFFICES  
TAVSS & FLETCHER, P. C.

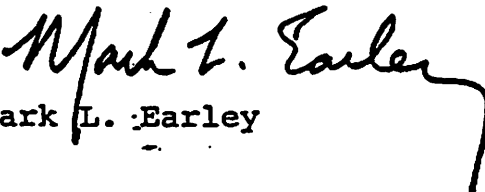
The Honorable John E. Clarkson  
May 17, 1983  
Page Eight

obvious that when they assessed the credibility of Mr. Dewald in talking about his pain and suffering, the effects of his scar, the length of time he missed from work, and many other elements of his testimony, they found his credibility lacking. The jury simply did not agree with plaintiff's counsel when it came to assessing damages.

CONCLUSION

Based on the foregoing, the defendant, by counsel, respectfully asks the Court that the plaintiff's motion to set aside the verdict and grant a new trial on the issue of damages alone be denied.

Respectfully submitted,

  
Mark L. Earley

MLE:tms

May 20, 1983

The Honorable John E. Clarkson  
Judge, Norfolk Circuit Court  
100 St. Paul's Boulevard  
Norfolk, Virginia 23510

Re: James DeWald v. James C. King  
Law No. L-82-411

Dear Judge Clarkson:

This letter is in reply to defendant's brief in opposition to plaintiff's motion for a new trial. Defendant relies primarily on the case of May v. Leach in support of his argument that plaintiff is not entitled to a new trial. This reliance is misplaced.

In the May case, the jury returned a verdict for a sum of money that was not itemized. The general verdict the Court found was amply supported by the evidence, particularly in view of the contradictory testimony and the questionable seriousness of the plaintiff's claim. The Court in May concluded that the verdict should not be disturbed since it reflected the jury's view as to each and every element of damage in the case and it could not be said from the record that all elements of damage were not properly considered.

The critical distinction in this case is that the jury did itemize their findings so that it cannot be said that the award encompasses any other element of damage other than that which was itemized. Therefore, unlike the May case, no argument can be made that part of the plaintiff's award was for pain and suffering, mental anguish, disfigurement, inconvenience, or the effect of bodily injuries upon the plaintiff's health. The damages were itemized with particularity and stated exactly what each element of damage the award encompassed, medical bills and lost wages.

Defendant argues that serious questions were raised concerning the amount spent for medical expenses and that there was ample evidence to conclude that the medical bills incurred by the plaintiff may have been the result of alcoholism. Despite the evidence being to the contrary, defendant also ignores the fact that the itemized award for medical expenses

Wherefore, plaintiff's motion to set aside the verdict and grant a new trial on the issues of damages should be granted.

Respectfully submitted,

William D. Breit

WDB/jc

cc: Mark L. Early, Esquire  
Robert G. Winters, Esquire



FOURTH JUDICIAL CIRCUIT OF VIRGINIA  
CIRCUIT COURT OF THE CITY OF NORFOLK

JOHN E. CLARKSON  
JUDGE

June 16, 1983

100 ST. PAUL'S BOULEVARD  
NORFOLK, VIRGINIA 23510

William D. Breit, Esquire  
720 Atlantic National Bank Bldg.  
415 St. Paul's Boulevard  
Norfolk, Virginia 23510

Mark L. Earley, Esquire  
P. O. Box 3747  
Norfolk, Virginia 23514

Robert G. Winters, Esquire  
P. O. Box 3668  
Norfolk, Virginia 23514

Re: James L. DeWald  
v. James C. King and  
Selected Risks Insurance Co.  
At Law No. L82-411

Gentlemen:

Plaintiff moves for a new trial on the issue of damages alone. The jury returned a verdict of \$4,500 which plaintiff argues is inadequate.

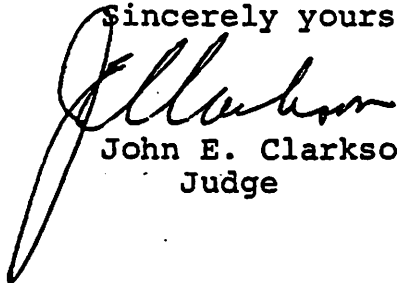
The court is clearly charged with the duty of setting aside verdicts where the damages are either so excessive or so small as to shock the conscience and to create the impression that the jury has been influenced by passion or prejudice or has in some way misconceived or misinterpreted the facts or the law. Further, the verdict will not be disturbed unless the court feels that the jury were actuated by passion, prejudice, or undue influence. From the evidence, the jury could have concluded that DeWald was not hurt as badly as he claimed; that the injuries were not disabling for the period he was out of work; or that the medical expenses claimed were all attributable to the accident. This being so, the verdict cannot be disturbed on the ground that it was inadequate. The court relies upon May v. Leach, 220 Va. 472; Doe v. West, 222 Va. 440; Chesapeake v. Arrington, 126 Va. 194; Borland v. Barrett, 76 Va. 128, and Rawle v. McIlhenny, 163 Va. 735.



June 16, 1983  
Page Two

Defendant will submit an order preserving plaintiffs exceptions.

Sincerely yours,

A handwritten signature in cursive script, appearing to read "John E. Clarkson".

John E. Clarkson  
Judge

JEC:dh

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF NORFOLK

JAMES DEWALD,

Plaintiff,

v.

AT LAW NO.: L-82-411

JAMES C. KING,

L1488-83

Defendant.

O R D E R

This day came the parties, plaintiff and defendant, by counsel, and the plaintiff having moved the Court to set aside the verdict of the jury on the grounds of being contrary to the law and the evidence and inadequate as a matter of law, and having also moved the Court to award a new trial on damages only, which motions, after having been fully heard and maturely considered by the Court, are overruled, to which action of the Court the plaintiff, by counsel, noted his objection.

Whereupon, it is considered and ordered by the Court that the said plaintiff recover of and have judgment against the said defendant in the sum of \$4,500.00, with interest thereon at a rate of ten percentum from the 26th day of

April, 1983, until paid, together with his costs in this behalf expended, to which defendant, by counsel, notes his objection.

The transcript of testimony and other incidents of trial is hereby made a part of the record in accordance with Rule 5:9 of the Rules of the Virginia Supreme Court.

ENTER:

Aug 4, 1983

JUDGE

J. E. CLARKSON, Judge

I Ask For This:

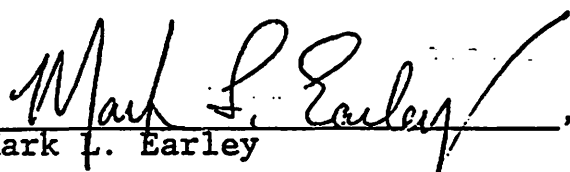
A COPY, TESTE: HUGH L. STOVALL, CLERK

BY: M. K. Collier, D.C.


  
William D. Breit

p. q.

Seen:

  
Mark L. Earley

p. d.

  
Robert G. Winters

p. d.

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF NORFOLK

JAMES L. DEWALD,

Plaintiff,

v.

AT LAW NO. L-82-411

JAMES C. KING,

Defendant.

NOTICE OF APPEAL

Pursuant to Rule 5:6 of the Supreme Court of Virginia, on this 4th day of August, 1983, James L. DeWald, by counsel, hereby gives notice that he appeals the judgment in favor of the plaintiff against the defendant in the amount of \$4,500.00, heard on April 26, 1983, final Order of Judgment entered on August 4, 1983. Transcripts of the proceedings in that Court will be furnished at a later date.

JAMES L. DEWALD

By \_\_\_\_\_  
Of Counsel

William D. Breit  
BREIT, RUTTER & MONTAGNA  
720 Atlantic National Bank Building  
415 St. Paul's Boulevard  
Norfolk, Virginia 23510

CERTIFICATE

I hereby certify that a true copy of the foregoing Notice of Appeal was mailed to all counsel of record this 4th day of August, 1983.

\_\_\_\_\_  
William D. Breit

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF NORFOLK

JAMES L. DEWALD,

Plaintiff,

v.

AT LAW NO. L-82-411

JAMES C. KING,

Defendant.

N O T I C E

TO: James C. King  
c/o Mark L. Earley, Esquire  
TAVSS & FLETCHER, P. C.  
Post Office Box 3747  
Norfolk, Virginia 23514

TAKE NOTICE that on Friday, the 30th day of September, 1983, I have filed in the Clerk's Office of the Circuit Court of the City of Norfolk, the transcript of the trial in this cause, identified as follows:

1. The record of the testimony of the proceedings had on April 26 and April 27, 1983, numbering 213 pages.
2. The record of the testimony of the proceedings had on April 26 and April 27, 1983, numbering 95 pages.

JAMES L. DEWALD

By \_\_\_\_\_  
Of Counsel

William D. Breit  
BREIT, RUTTER & MONTAGNA  
720 Atlantic National Bank Building  
415 St. Paul's Boulevard  
Norfolk, Virginia 23510



CERTIFICATE

I hereby certify that a true copy of the foregoing  
Notice was mailed to all counsel of record this 26th day of  
September, 1983.

---

William D. Breit

1 preliminary reading of the following, so the  
2 evidence will be from the jury box and not what  
3 I said or what the attorneys say, that will be  
4 where you get your evidence. Anything further?

5 MR. BREIT: Thank you.

6  
7 (Opening statement presented by  
8 Mr. Breit.)

9  
10 (Opening statement presented by  
11 Mr. Earley.)

12  
13 THE COURT: All right, Mr. Breit,  
14 do you want to call your first witness?

15 MR. BREIT: Is the doctor here?

16  
17 JAMES P. DEVEREUX,  
18 a Witness, having been first  
19 duly sworn, was examined and  
20 testified as follows:

21  
22 DIRECT EXAMINATION

23  
24 BY MR. BREIT:

25 Q. Doctor Devereux, would you state

1 your full name for the jury, please.

2 A. James Peter Devereux.

3 Q. And what is your occupation?

4 A. Orthopedic surgeon.

5 Q. Where do you practice?

6 A. In Norfolk. Office address is  
7 844 Kempsville Road.

8 Q. How many years have you been  
9 practicing orthopedic medicine in the area?

10 A. Eight years.

11 Q. Could you briefly give the  
12 members of the jury your educational background  
13 and training leading up to orthopedic practice?

14 A. The normal medical school  
15 curriculum M.D. degree followed by year of  
16 internship, two years of general surgery  
17 residency and three years of orthopedic surgery  
18 residency following which I got a fellowship  
19 with the American Academy of Orthopedic Surgery  
20 certified in orthopedic surgery.

21 Q. You are licensed to practice  
22 your specialty in the State of Virginia?

23 A. In Virginia -- well, in the U.  
24 S.

25 Q. Do you have any other

1 fellowships or members of any boards or  
2 societies to which you belong?

3 A. No.

4 Q. Now, in the course of your  
5 practice, did you have an occasion to see James  
6 Dewald?

7 A. Yes, I did.

8 Q. And did you get a history from  
9 Mr. Dewald at the time you first saw him?

10 A. Yes, I saw him in the hospital  
11 and he had been injured when he had been hit by  
12 a car.

13 MR. EARLEY: I would object to  
14 the Doctor testifying as to how the injury  
15 occurred. It would probably be hearsay.

16 THE COURT: That's part of his  
17 medical record and he is just giving what the  
18 report was to him.

19  
20 BY MR. BREIT:

21 Q. What was the date that you saw  
22 him?

23 A. If I may refer to this.

24 Q. Absolutely, refer to your  
25 records.

1           A.       He was admitted on 3/13/80 into  
2 DePaul Hospital.

3           Q.       And the day that he was admitted,  
4 did you have a history that he had been seen in  
5 the emergency room earlier?

6           A.       Was seen in the emergency room  
7 on 3/8.

8           Q.       On 3/8/80 what was his treatment  
9 in the emergency room?

10          A.       I don't know. I would have to  
11 refer to the emergency record. I didn't see him.

12          Q.       Refer to the records you have  
13 brought with you.

14          A.       The notes from the emergency  
15 room visit on that day -- I believe he was  
16 given --

17               MR. EARLEY:   Again, I would  
18 object to the extent that Dr. Devereux was not  
19 present in the emergency room.

20               THE COURT:   This is something  
21 different than what you objected to before.  
22 Mr. Breit, you are not going to offer in  
23 evidence as to the emergency room, are you,  
24 other than what he found in the records?

25               MR. BREIT:   Yes, sir, just from

1 the record what he found the treatment to be on  
2 3/8/80 that he treated him for on 3/13/80.

3 THE COURT: Just a second,  
4 Doctor. Oh, you saw him?

5 THE WITNESS: I saw him on 3/13.  
6 I admitted him to the hospital when he came  
7 back to the hospital. He had been complaining  
8 of injuries prior to that. I did not see him or  
9 treat him for those, but I saw him for those  
10 injuries and admitted him to the hospital on, I  
11 think, 3/12.

12 MR. EARLEY: My understanding to  
13 Mr. Breit's question was the emergency room  
14 report of 3/8. The emergency room report of  
15 3/12 I have no problem.

16 THE COURT: There certainly  
17 isn't any question as to what Dr. Devereux did.  
18 The only issue is whether Dr. Devereux can  
19 testify from the hospital records as to what  
20 happened on the first hospitalization; is that  
21 correct?

22 MR. BREIT: Yes, sir, that was  
23 the question.

24 THE COURT: I think Dr. Devereux  
25 can state what is in the hospital records.

1  
2 BY MR. BREIT:

3 Q. Yes, sir. What was the treatment  
4 on 3/8/80?

5 A. I am looking for that. He was  
6 seen in the emergency room on 3/8/80 with  
7 lacerations and injuries to his leg. I believe  
8 the record shows that he was discharged from  
9 the hospital, released from the hospital and  
10 returned complaining of problems with the legs,  
11 specifically the ones I dealt with when I saw  
12 him, swelling and pain in the legs.

13 Q. He returned to see you on  
14 3/12/80?

15 A. Yeah. I must have been on call  
16 that day. I met him at the hospital.

17 Q. Now, my question went back to  
18 what do the records reflect the treatment was  
19 on 3/8/80?

20 A. All I have --

21 Q. You mentioned some lacerations?

22 A. Yes, but I don't have a full  
23 treatment of his -- I don't have a full record  
24 of his treatment on that day. I have the  
25 records of his hospitalization following the

1 time I saw him and the subsequent follow-up  
2 when he was released from the hospital.

3 Q. Do you have the record of 3/8/80  
4 or did you refer to it when you admitted him?

5 A. I had in my notes this is where  
6 he had been seen. I don't have his emergency  
7 room record.

8 MR. BREIT: If I may, maybe I  
9 can approach the bench.

10  
11 (Counsel approached the bench  
12 and a side bar conference was held.)

13  
14 BY MR. BREIT:

15 Q. Doctor, this is the hospital  
16 record, the entire record that has been  
17 subpoenaed to the Court. On 3/12/80 when you  
18 admitted him into the hospital, what did you  
19 admit him for?

20 A. I admitted him because he had  
21 complained of pain, of swelling and pain in the  
22 legs and X-rays showed he fractured both fibula.

23 Q. Those X-rays, were they taken on  
24 3/8/80 or taken when he came back in on 3/12/80?

25 A. I don't have a record either way.



1 I am going by my hospital notes. I don't have  
2 the hospital radiology department report. Well,  
3 I do, I am sorry. I have an X-ray from 3/12  
4 reporting these fractures.

5 Q. Do you know whether his legs  
6 were x-rayed on 3/8/80 based upon the hospital  
7 records?

8 A. On this hospital record from  
9 that date I am looking at it now to see if it  
10 did. I don't believe he did. He had skull films  
11 and lumbar spine films.

12 Q. What is that?

13 A. He had skull X-rays and spine  
14 X-rays, but he has no X-rays of his legs.

15 Q. And when he subsequently came in  
16 on 3/12, you did x-ray his legs?

17 A. We did x-ray his legs.

18 Q. Does the record indicate what  
19 other treatment was done for him on 3/8/80?

20 A. On the initial visit he had  
21 lacerations of the scalp which were sutured.  
22 And he was given tetanus toxoid which is normal  
23 for an open wound. And the doctor that saw him  
24 noticed he had scalp and facial lacerations  
25 with contusions, bruises, and released him as

1 far as I can tell.

2 Q. When you saw him on 3/12/80, did  
3 you conduct an examination of him at that time?

4 A. Yes, I did.

5 Q. And briefly tell the members of  
6 the jury what that examination was.

7 A. The area I was mostly concerned  
8 with were his legs. He was complaining of pain  
9 in the legs. His legs had swollen over the  
10 past several days. He had difficulty -- he  
11 could stand and walk, but had difficulty in  
12 doing so. The injured areas involved the leg  
13 below the knee. The painful areas were  
14 basically just below the knee. The X-rays taken  
15 of his legs showed that he had fractures of  
16 both the fibula, which is the two bones in your  
17 leg below the knee. One is the big bone, tibia,  
18 and the other one is smaller one, and he had  
19 had both of those broken and I put him in the  
20 hospital because obviously he wasn't going to  
21 be able to manage at home.

22 Q. Now, could you describe what his  
23 legs looked like at that time?

24 A. They were swollen, puffed up  
25 from edema which is basically tissue fluid.

20  
1 They were like a bruise. They looked enlarged  
2 and the whole leg down from the knee down was  
3 swollen.

4 Q. Based upon the history, were you  
5 able to state with reasonable medical certainty  
6 whether that was a direct result of being  
7 struck by the automobile?

8 A. I had a history from Mr. Dewald  
9 that he had been injured in an accident and it  
10 appeared that the injuries I found would have  
11 been consistent with an accident like that.

12 Q. Now, did you see any other  
13 lacerations or bruises about his body at that  
14 time?

15 A. He had, I know, recently had  
16 sutures.

17 Q. Do you know how many sutures  
18 were in his scalp at that time?

19 A. How many, I don't know. I know  
20 the emergency room doctors count them, but I  
21 don't count them.

22 Q. And those were where, if you  
23 know?

24 A. In his face and scalp, but I  
25 don't have the location.

1 Q. So he had sutures on his face  
2 and sutures on his scalp and edema of the legs?

3 A. Yes.

4 Q. Was he making any other  
5 complaints to you at that time?

6 A. No.

7 Q. Now, what type of fractures did  
8 he have in his leg?

9 A. The fractures were closed in  
10 that there was no open wound associated with  
11 them. They were what we usually call a simple  
12 fracture or closed fracture of the proximal  
13 fibula.

14 Q. And why did you feel that it was  
15 necessary to hospitalize him?

16 A. He had fractures of both legs  
17 and was having difficulty walking; also because  
18 of the swelling. The only way to alleviate the  
19 swelling would be to put him in bed rest and  
20 elevate the leg.

21 Q. Were his legs placed in casts at  
22 that time?

23 A. Not in a plaster cast. He did  
24 need suspension for the leg and strap-on type  
25 suspension was used.

1 Q. And how long was he hospitalized  
2 for?

3 A. He was in the hospital from the  
4 day he was admitted and released on 4/2, 3/12  
5 through 4/2/80.

6 Q. And what was the reason that he  
7 had to be hospitalized up through the beginning  
8 of April of 1980?

9 A. We got him out of bed. He  
10 required physical therapy and had to use a  
11 walker to lean on and pins on the leg and took  
12 him a time to get him to the point where he was  
13 ambulatory.

14 Q. Can you describe what the  
15 ordinary course of treatment would be for a  
16 patient?

17 A. With an injury like that if it  
18 had involved one leg I think he could have  
19 managed as an outpatient because he would  
20 obviously have had one good leg to walk on, but  
21 two legs injured it is difficult. It is not  
22 absolutely necessary to apply a cast to these  
23 injuries unless they are at a point in the bone,  
24 sometimes further down the bone or shaft. The  
25 upper angle of the bone tends not to shift out

23  
1 of position. At the upper part of that bone  
2 there is no real weight-bearing load involved.  
3 Most of the load your weight goes on the bigger  
4 of the two bones. Because of pain in both legs  
5 I don't think we could let him go home.

6 Q. Were there any other injuries to  
7 his knees or any other part of his body?

8 A. He had strain of the ligaments  
9 of his knee on one side, on the left side,  
10 strain on the lateral ligaments of his knee.

11 Q. What are the ligaments?

12 A. The ligaments in a joint are  
13 what holds the joint together. In the knee  
14 there is movement backward and forward, you can  
15 straighten out your knee and bend it. At each  
16 side of the knee, to prevent it from going  
17 sideways, there are ligaments like tendons,  
18 thick, very strong material that allow the knee  
19 to move backward and forward but not side to  
20 side. He had stretched these. He had some  
21 swelling and pain and that type of thing. He  
22 hadn't torn them which would have made his  
23 injury more serious, but he had injured them.  
24 It would have been part of the type of injury  
25 he had sustained to his leg.

1 Q. Did you feel that the injury to  
2 his knee -- can you state with reasonable  
3 certainty whether that was as a result of the  
4 accident?

5 A. His injury, the injuries to his  
6 knees appeared to have been caused by a direct  
7 pressure. It's not the type of injury he would  
8 have got by, for example, falling down or  
9 twisting his knee.

10 Q. Why do you say this is the type  
11 of injury that was involved with direct  
12 pressure?

13 A. Because of the location in the  
14 bone. If you fall and twist your leg generally  
15 the part of that bone which breaks is much  
16 lower down, right down at the ankle, or if  
17 anything were to break, if one of the two were  
18 to break in a fall in a twisting injury or fall,  
19 probably it would have been the bigger of the  
20 two bones. It's hard to break that one at the  
21 top of your leg. There isn't much pressure on  
22 it weight bearing or doing anything unless  
23 something hits it.

24 Q. In your opinion, would this be  
25 consistent with being struck by an automobile?

1                   A.       It would.

2                   Q.       Let me ask you what your course  
3 of treatment was after that.

4                   A.       He was maintained on bed rest  
5 for a period in the hospital before allowed up  
6 and with the legs elevated the legs were  
7 wrapped with elastic bandages to allow the  
8 swelling to go down. The knee ~~4~~ the leg in  
9 which he had injured, the ligaments of his knee  
10 were splinted and then he was allowed up to  
11 walk with crutches and wheelchair to get him  
12 around. It took the rest of the time in the  
13 hospital basically to get him moving enough to  
14 where we felt he could go home to where he  
15 could manage to get around on his own and take  
16 care of himself.

17                  Q.       Now, what was the treatment with  
18 respect to the knee and the ligaments?

19                  A.       Just the immobilization of the  
20 splint. That's really why he was splinted.  
21 because of the knee.

22                  Q.       How long was the immobilization  
23 in the knee for?

24                  A.       He was discharged with the  
25 splint on and it was removed or allowed to be



1 discontinued when he returned to outpatient  
2 clinic after discharge on 4/17, sorry, excuse  
3 me, yeah, it was 4/17 was that visit and the  
4 splint was discontinued.

5 Q. So he had some type of splint on  
6 his knee?

7 A. On his leg.

8 Q. Through the entire time up  
9 through April 17?

10 A. That's correct.

11 Q. What type of pain does a patient  
12 like this experience from these types of  
13 injuries during the hospitalization?

14 A. Fractures generally are painful,  
15 quite painful apart from a disturbance on the  
16 leg or pressure on the injured area for  
17 approximately one week. Following that it's  
18 painful on use.

19 The function of the two bones he  
20 injured are, for the most part, to provide  
21 insertion, anchor point for the muscles that  
22 work, the calf and foot. And when these muscles  
23 are used it would pull on the damaged area and  
24 would hurt. If anything presses against them  
25 for three or four weeks afterwards they are

1       sore.

2               Q.       Doctor, did you have a bill for  
3       your services?

4               A.       No.

5               Q.       And why was that?

6               A.       He was seen in the outpatient  
7       clinic and I work up there once a week for  
8       nothing.

9               Q.       That's at DePaul Hospital?

10              A.       Yes.

11              Q.       Now, they had a bill for their  
12       services?

13              A.       I am sure they did.

14              Q.       What was his course of treatment  
15       at the clinic and how often did he go back  
16       there?

17              A.       He was seen by a number of my  
18       own partners and one man from the other  
19       orthopedic group in town on several occasions.  
20       Basically he was followed. We x-rayed to see  
21       how his fractures were progressing and started  
22       on rehabilitation type of exercises to  
23       strengthen the legs.

24              Q.       How long would you anticipate  
25       his disability to be in an injury of this sort?

1           A.       With that injury I think he  
2 would have been severely limited for six weeks  
3 and another six to eight weeks following that  
4 he would have had weakness, some irritation of  
5 motion due to stiffness and being unable to  
6 carry out a strenuous or pronounced activity,  
7 even including walking for long distances.

8           Q.       How long was he treated at the  
9 clinic?

10          A.       His last visit was in August of '80 --  
11 sorry, excuse me, September of '80.

12          Q.       In September of 1980?

13          A.       Yes.

14          Q.       And --

15          A.       No, sorry. His last visit in the  
16 clinic was 1/2/81.

17          Q.       And at that time what was his  
18 condition with respect to his legs and his  
19 knees?

20          A.       He was seen by Doctor Taylor who  
21 made a notation in the chart. Doctor Taylor is  
22 an orthopedic surgeon who works in the office  
23 with me. He had had complaints of back pain and  
24 continued complaints about the knee. His  
25 examination showed that the knee and ankle

1 appeared normal. His ankle was re-x-rayed  
2 because he had complained quite a bit about it  
3 and the X-rays showed no evidence of any bone  
4 injury.

5 Q. What about with respect to his  
6 fractures?

7 A. They healed.

8 Q. Was he complaining of any pain  
9 in January of '81?

10 A. There is no note of any  
11 complaint of his knees or of leg at that time.  
12 He was complaining about his ankle.

13 Q. What is the history with respect  
14 to a knee where there is ligament damage?

15 A. Depending on the degree of  
16 damage --

17 MR. EARLEY: I will object to  
18 this, just a general question like that unless  
19 Mr. Breit ties it in somehow how it is  
20 important to Mr. Dewald.

21 MR. BREIT: May I approach the  
22 bench?

23 THE COURT: Certainly.

(Counsel approached the bench  
and a side bar conference was held.)

BY MR. BREIT:

Q. Doctor, have you had any  
opportunity to see Mr. Dewald since he was last  
seen in the clinic in January of '81?

A. I don't believe I saw him in the  
outpatient clinic. He was seen by a number of  
orthopedics, Doctor Taylor and Neff and Dr.  
Spear.

Q. Do you know his present  
condition?

A. From his record.

Q. What does that state?

A. That he had recovered.

MR. BREIT: I have no further  
questions. Thank you, Doctor.

CROSS EXAMINATION

BY MR. EARLEY:

Q. Dr. Devereux, when you admitted  
this patient on 3/13/80 --

MR. BREIT: I believe it was

corrected.

THE WITNESS: I believe it was 3/12. The admission date is 3/12. There is a date at the end of dictation that I have it was typed 3/13, that's where I got 3/13, but he was admitted 3/12.

BY MR. EARLEY:

Q. When you admitted him and made your diagnosis, in addition to making the diagnosis of a fracture, what other diagnosis did you make with respect to Mr. Dewald's health?

A. The impression at the end of admission history and physical was that he had a fractured fibula, left and right leg, a sprain of the left collateral ligament and he was discharged with final diagnosis bilateral fractured fibula.

Q. Isn't it a fact, Doctor, that your diagnosis also was that he was a chronic alcoholic?

A. That is part of his medical history, yes.

Q. Was that not part of your

1 diagnosis?

2 A. No. I admitted him because of  
3 fractures of his leg.

4 Q. I understand that, but I am  
5 looking at your physician's orders and your  
6 diagnosis. And I note here that there are two  
7 diagnoses, one is fracture, both fibulas,  
8 second is chronic alcoholic; dated 3/12/80 and  
9 signed by you.

10 A. This is the page. There is  
11 probably another page to it and it may well  
12 have that in there if you have it, and it's the  
13 second page of the admission history and  
14 physical. Can I just see it? If that's it,  
15 that's it. Oh, okay. That's the physician's  
16 orders. The reason we write that down is that  
17 somebody who is alcoholic or has been it's  
18 difficult to tell how much they have been  
19 drinking before they were admitted. If they  
20 have been drinking there is possibility they  
21 will have acute withdrawal, which is serious.  
22 That is noted in the chart.

23 Q. What was the evidence that you  
24 based your diagnosis --

25 A. Partly from history. He had a

53

1 liver biopsy at one time and that's basically  
2 it. I don't believe he had a blood alcohol done.  
3 I don't have any note of it in the chart. He  
4 may have.

5 Q. Would the lab report, perhaps,  
6 show if there was a blood alcohol content done?

7 A. It may be. I don't have the lab  
8 reports. I have just his clinical notes.

9 Q. I show you what appears to be a  
10 lab report done on Mr. Dewald.

11 MR. BREIT: I am going to have  
12 to object at this point. I can't see any  
13 relevance of it at this point as to what we are  
14 getting into. I know what the Court has ruled  
15 on this issue and I think the question ought to  
16 be addressed head-on and found out whether it  
17 does have any relevance or not, but to get into  
18 all the evidence and find out it doesn't have  
19 anything to do with this case is putting the  
20 cart before the horse.

21 THE COURT: We will let him see  
22 if he can tie it in. He has only asked the  
23 doctor at this point if that is a lab report  
24 indicating blood alcohol content.

25 MR. BREIT: I understand, Judge.



1 THE COURT: And I haven't heard  
2 the answer.

3 THE WITNESS: There is a blood  
4 alcohol level on March 12th.

5  
6 BY MR. EARLEY:

7 Q. And what is that?

8 A. 0.24 percent.

9 Q. Dr. Devereux, correct me if I am  
10 wrong, but the only evidence that you had when  
11 you treated Mr. Dewald during his hospital stay  
12 as to how he sustained these injuries was based  
13 on what he had told you?

14 A. Yes.

15 Q. And also what he had told any  
16 other doctors that you might have gotten word  
17 from; is that correct?

18 A. That's correct.

19 Q. You have no firsthand personal  
20 knowledge of how he sustained the fractures to  
21 his leg or the damage to his knee and the  
22 ligaments; is that correct?

23 A. That's correct. I have his  
24 history taken in the normal manner.

25 Q. Dr. Devereux, I am looking at

1 your admittance and discharge summary. It's  
2 correct, is it not, that when he first came to  
3 the emergency room on 3/8/80 his major  
4 complaint was with his head and the head injury?

5 A. Yes. I did not see him on that  
6 occasion. That's what is mentioned in the chart.

7 Q. And that is, in fact, what your  
8 admission and discharge summary says in its  
9 first paragraph, is it not?

10 A. That it says what?

11 Q. I am looking at the second  
12 sentence, the first sentence of your admission  
13 and discharge summary starting with he had been  
14 seen?

15 A. He had been seen in the  
16 emergency room -- what it says is that he had  
17 returned to the emergency room from an auto  
18 accident which occurred, and continued to  
19 experience pain in legs and had developed  
20 increased swelling. Is this what you mean, this  
21 one?

22 Q. If I might approach you again.  
23 That's correct. You note there he had not  
24 complained of leg pain at that time?

25 A. That's right.

1 Q. So when he first came to the  
2 emergency room, as far as you were aware, as  
3 far as you are aware today and at this time, he  
4 had not complained of leg pain but had come  
5 back?

6 A. Come back complaining of pain.

7 Q. And that was some four days  
8 later, is that not correct?

9 A. That's right.

10 Q. And the X-rays that were taken  
11 that revealed the fractures were not taken the  
12 night of the automobile --

13 A. No, taken the return visit.

14 Q. But were taken on 12th of March,  
15 four days later?

16 A. That's correct.

17 Q. And you have no knowledge as to  
18 what could have or what did happen to him in  
19 that intervening time period, do you?

20 A. No.

21 Q. Did you have a chance to review  
22 the skull X-rays that were taken on the 8th of  
23 March?

24 A. No, I didn't think it was  
25 necessary. At the time I saw him it wasn't

1 necessary. He had skull X-rays which were taken  
2 because he had a head injury. This was the most  
3 obvious apparent thing to the emergency room  
4 physician when he saw him on the first visit.

5 Q. And as far as you know there was  
6 no reason to re-examine those X-rays because  
7 they didn't show a concussion or any other  
8 major injuries?

9 A. The X-rays wouldn't show a  
10 concussion. The concussion is not something  
11 that you would see on X-rays. The only thing is  
12 fracture of skull.

13 Q. And no evidence of that?

14 A. No fracture.

15 Q. I believe you also mentioned,  
16 Dr. Devereux, that when he came back to the  
17 emergency room this second time, some four days  
18 later, that his legs were swollen?

19 A. Yes.

20 Q. Is that correct?

21 A. That's correct.

22 Q. Again, you have no knowledge, do  
23 you, as to when that swelling started other  
24 than what Mr. Dewald told you?

25 A. No. But it was considerable and

1 would have occurred over a period of probably  
2 several days.

3 Q. Did he mention to you why he  
4 made no effort to come back to the hospital  
5 sooner?

6 A. I have no note of that, no. I  
7 don't think he did.

8 Q. But you said this swelling would  
9 have been going on for several days?

10 A. It looked like it had been there  
11 for several days.

12 Q. It wouldn't just appear  
13 overnight?

14 A. I don't think so.

15 Q. Dr. Devereux, we touched a  
16 minute ago on the fact that when Mr. Dewald was  
17 admitted there was a twofold diagnosis; the  
18 primary diagnosis that he had fractured legs  
19 and there was a secondary diagnosis which you  
20 noted down of his alcoholic history, chronic  
21 alcoholism is what appeared in the report I  
22 referred you to?

23 A. Right.

24 Q. Now, Mr. Dewald was in the  
25 hospital, I believe you testified, from 3/12 to

1 4/27

2 A. Right, yes.

3 Q. Now, let me ask you in your  
4 professional opinion, that seems to me like a  
5 long hospital stay. I know a fracture is  
6 certainly nothing to make light of, especially  
7 two fractures. Isn't it true that some of the  
8 length of his stay and his slow recuperation  
9 can be attributed to his mental health as far  
10 as his alcoholic background is concerned?

11 A. I really think that he was in  
12 the hospital because he had two broken legs  
13 that took a while to get walking, irrespective  
14 of any problem he had with alcoholism. He  
15 wasn't drinking in the hospital. You know, he  
16 was at a point where he was controlled and seen  
17 by physical therapists. It wasn't a question  
18 really that he just wasn't doing it. I think he  
19 had legitimate difficulty walking.

20 Q. I certainly would agree with you,  
21 Doctor. My point is certainly a man who is a  
22 chronic alcoholic and has that history has more  
23 difficulty recuperating from illnesses than  
24 does a man who comes in in fit health?

25 A. I don't think that is true. The

1 bone will heal at same rate whether you are  
2 alcoholic, diabetic or schizophrenic.

3 Q. Doesn't an alcoholic have an  
4 issue of vitality in his vibrance and --

5 A. I would grant you that, but I  
6 don't know this has any relevance to how he  
7 progressed in the hospital.

8 THE COURT: What is your  
9 objection?

10 MR. BREIT: The doctor has  
11 testified twice on this question and I have had  
12 a continuing objection and I think it's very  
13 clear now that objection is well-founded and  
14 ask this Court to instruct the Court to  
15 disregard this entire line of questioning and  
16 testimony.

17 THE COURT: He is on  
18 cross-examination. I will give him some  
19 latitude. I overrule your objection, note your  
20 exception.

21  
22 BY MR. EARLEY:

23 Q. I just want to go back, your  
24 answer was interrupted. You did say that you  
25 would grant that it might have something to do,

1 if I could finish, you might grant that an  
2 alcoholic and a man who had an alcoholic  
3 history that might have a bearing on his  
4 recouperation with respect to his vitality and  
5 desire to spring back, although I believe you  
6 stated you are not sure whether it had any  
7 relevance in this particular case.

8 MR. BREIT: He is totally  
9 misquoting the witness now. The Doctor hasn't  
10 said anything to do with that and if he wants  
11 to ask the question properly I don't have an  
12 objection since the Court has made a ruling,  
13 but he can't misquote the witness and ask it in  
14 the phraseology of a question.

15 MR. EARLEY: I was asking him if  
16 I understood him correctly.

17 MR. BREIT: It's not a question  
18 of understanding him correctly.

19 THE COURT: When he states  
20 something that you feel is improper, Mr. Breit,  
21 if you would step up at that time and help us  
22 all by your objection at that point. And I will  
23 certainly agree with you. Sustain the  
24 objection. If there are facts misstated, we  
25 will sustain it. And I am sure Mr. Earley is



1 not going to do it on purpose. And he is asking  
2 the Doctor is this your understanding. And so  
3 we are all trying to get at what the facts are,  
4 so if you would ask the question the same way,  
5 Mr. Earley; and, Mr. Breit, if you have  
6 objections if you object at that point then let  
7 the Court rule on it.

8 MR. EARLEY: I withdraw the  
9 question and move on.

10  
11 BY MR. EARLEY:

12 Q. Dr. Devereux, you mentioned,  
13 getting to the knees, not the fracture, that  
14 the kind of problem he had with knees and  
15 ligaments adjoining the knees would have been  
16 caused by some sort of direct pressure as  
17 opposed to twisting and falling?

18 A. Not the knee, the fractures. I  
19 couldn't say exactly how he injured his knee.  
20 There are many ways you can do that. You can do  
21 it in other ways, but I think just because of  
22 the fact that it is difficult really to  
23 fracture that bone in that place without  
24 something striking against your leg.

25 Q. But, again, you don't know what,

1 if anything, struck his leg to cause that?

2 A. Only the history I was given.

3 Q. With respect to the knee injury,  
4 I believe you just testified that that kind of  
5 injury is not necessarily caused by direct  
6 pressure being applied, is that correct, that  
7 that could happen in a number of ways?

8 A. Several ways of injuring that  
9 injury.

10 Q. Tell us several ways.

11 A. It can be caused by sports  
12 injury is usually where it occurs, playing  
13 football, running, and their foot is planted  
14 and they are hit, not their knee, but they are  
15 hit and twisted with their weight on that foot.  
16 It can be caused by a fall if the foot is  
17 wedged in some way so that the body weight  
18 turns on the leg. Really it takes a fair amount  
19 of force to do it.

20 Q. There was no lacerations or cuts  
21 to his leg, was there?

22 A. No, no cuts on his legs.

23 Q. You said this kind of injury  
24 would cause someone to be disabled, if you will,  
25 for six weeks?

44

1           A.       Yes, it would take six weeks to  
2 the point where they can really begin their  
3 rehabilitation.

4           Q.       And you said the following six  
5 to eight weeks there would be some weakness  
6 that would preclude strenuous activity?

7           A.       Weakness that would prevent him  
8 from walking prolonged distances more than a  
9 block or two or running.

10          Q.       It wouldn't necessarily preclude  
11 a presumption of daily normal routine  
12 activities, would it, assuming they didn't  
13 include anything strenuous?

14          A.       Daily activity would take care  
15 of himself, that thing, yes.

16          Q.       And he could certainly work if  
17 the job did not entail a great deal of physical  
18 strength?

19          A.       It would depend on what the job  
20 was. He could work in an office situation where  
21 he was sitting in desk all day and travel by  
22 car to and from his work, but probably he could  
23 not be expected to run to any occupation where  
24 there was manual labor involved, walking  
25 distances such as people walk and things like

1           that.

2                   Q.       If I might ask again, Doctor,  
3           and I believe this came out on direct but I  
4           wanted to nail down the date. What was the  
5           last date that he came into the clinic? I  
6           believe it was September '80 date. That may  
7           not be the date.

8                   A.       I said that and there is a page  
9           underneath that. The last visit to the clinic --  
10          I lost it again -- the last visit to the clinic  
11          was in January of '81.

12                   Q.       At that time, based on your  
13          examination of him, you felt he had fully  
14          recovered?

15                   A.       I didn't personally see him in  
16          the clinic on that visit. He was seen by one of  
17          my associates, Dr. Taylor, I believe it was,  
18          who repeated an X-ray of his ankle because he  
19          had complained of pain in his ankle and the  
20          X-ray was negative. The remainder of his  
21          problems had appeared to recover.

22                   Q.       When was the last time you saw  
23          him in the clinic?

24                   A.       I saw him probably -- I saw him  
25          for the last time on his return visit from the

1 hospital after his discharge. I discontinued  
2 his splint because he was walking well then.

3 Q. What was the date?

4 A. 4/17. His return visit to the  
5 clinic usually --

6 Q. So since April of '80 you had no  
7 personal contact with Mr. Dewald?

8 A. No, that's correct.

9 Q. And so when he complains of an  
10 ankle problem sometime in January you have no  
11 idea what's that from?

12 A. Only that there is a sequence in  
13 the reports in his chart.

14 Q. But you have had no personal  
15 knowledge?

16 A. No, sir.

17 MR. EARLEY: No further  
18 questions.

19 THE COURT: Anything further?

20 MR. BREIT: I have a motion. I  
21 would like to make at this time.

22 THE COURT: All right, ladies  
23 and gentlemen of the jury, if I could get you  
24 to step back in your box while I hear the  
25 motions and we hope it won't be too long.

1                   [ MR. BREIT: I have had a  
2 continuing objection to this alcohol question.  
3 It began in chambers when I asked this Court to  
4 not allow this type of question.

5                   THE COURT: The question came  
6 out in your favor. The questions and answers  
7 came out in your favor.

8                   MR. BREIT: That's exactly right.  
9 I am very pleased with it all and absolutely no  
10 connection whatsoever of any kind. But we do  
11 have alcohol content and alcohol question now  
12 before the jury with absolutely no relationship  
13 or no bearing to this case in any way, shape or  
14 form.


15                  THE COURT: The doctor helped  
16 you out.

17                  MR. BREIT: Yes, sir, but  
18 because the questions have been laid this Court  
19 has an obligation to instruct this jury to  
20 disregard all of that testimony with regard to  
21 alcohol content and any diagnosis of chronic  
22 alcoholism that has absolutely no bearing on  
23 this case and has no relationship to this case  
24 and no connection having ever been made by the  
25 doctor. It was a fishing expedition and no fish

1 were caught and in view of that fact the  
2 plaintiff has been prejudiced by that and they  
3 are required to actually a mistrial, I would  
4 think, under these circumstances, but I would  
5 be satisfied to have this Court admonish the  
6 jury that that has no bearing on this case and  
7 should not be considered by them and they  
8 should disregard that evidence.

9 THE COURT: I think that I will  
10 be glad to hear Mr. Earley, but I would just  
11 comment his questions were asked and they  
12 produced nothing but very helpful answers for  
13 you. I don't see that you are prejudiced at all.  
14 Mr. Earley, I will be glad to hear from you.

15 MR. BREIT: We are going to have  
16 this problem again on argument. Is he going to  
17 be allowed to argue that point?

18 THE COURT: No evidence to be in  
19 his favor to argue anything at this point. Mr.  
20 Earley, anything you want to add? 

21 MR. EARLEY: Judge, I have  
22 ambivalent feelings about what came out. On one  
23 hand they were helpful. On the other hand I  
24 would very strongly feel they should be left on  
25 the record. It's part of the diagnosis and Dr.

1 Devereux did state, I think a little  
2 reluctantly, that alcoholism may not have had  
3 anything to do with his recovering from the leg  
4 fracture, but it does at times have, I will  
5 grant you, may have something to do with the  
6 patient's vitality. He said whether that's  
7 relevant in this case, I don't know.

8 THE COURT: Mr. Breit, I will  
9 overrule your motion and note your exception to  
10 the record. And now, anything further with the  
11 Doctor?

12 MR. BREIT: Yes, I have some  
13 brief cross-examination of the Doctor.

14 THE COURT: All right, bring the  
15 jury back.

16  
17 REDIRECT EXAMINATION

18  
19 BY MR. BREIT:

20 ~~Q.~~ Q. Doctor, did your treatment or  
21 his hospital stay have anything to do at all  
22 with any problems this man may have had in the  
23 past with alcohol?

24 A. No. I admitted him because he  
25 had had injuries to his leg so we were getting



1 him for injuries to his legs. I don't feel that  
2 his response to either his injury or his  
3 treatment as far as the length of stay of  
4 hospitalization really was altered. I think it  
5 is difficult to tell how much someone is  
6 hurting. I have no way of knowing that. If I  
7 tend to take people as they say, if someone  
8 tells me they are hurting, I say okay, they are  
9 hurting unless it's obvious that they have some  
10 reason to try and mislead me. Most people are  
11 pretty straightforward. If they hurt, they do.  
12 If they don't, they don't. And if they can  
13 walk, they walk.

14 Q. In your course of treatment with  
15 Mr. Dewald, did you have any reason to question  
16 his truth?

17 A. I don't think there was from  
18 what he had as injuries coming in, with both  
19 legs injured, it is a little different as far  
20 as the length of stay of the hospitalization  
21 with one leg injured. More than likely I am  
22 sure I would not have hospitalized him.  
23 Irrespective of whether or not he has any other  
24 medical condition if there was any reason to  
25 hospitalize him for anything else I wouldn't

1           treat him because that's not what I do.

2                   Q.       Was he treated for anything else  
3           in the hospital except for the fracture?

4                   A.       I don't think he was. Other than  
5           the suturing when he came in for the first  
6           visit that time, but I don't believe anything  
7           in the record that he was treated specifically  
8           for.

9                   Q.       Was his hospital stay lengthened  
10          one day at all because of any prior condition?

11                  A.       Because he has a history of that,  
12          there is no straight answers to that. I don't  
13          knew. I believe that his hospital stay was  
14          appropriate for his injuries. Although some  
15          people will get out of the hospital faster with  
16          the same injuries, I will grant you that. And  
17          there is no real way I can tell what happened  
18          as far as how long he should or should not have  
19          stayed in the hospital. His length of  
20          hospitalization was appropriate for those types  
21          of injuries or I would have gotten a notice  
22          from the review board as to why he was so long  
23          in the hospital.

24                  Q.       So that was --

25                  A.       I mean, there is a medical

1 review evaluation that is ongoing in  
2 hospitalization. On admission diagnosis if your  
3 length of stay is inappropriate -- if I put  
4 people in the hospital for something that  
5 doesn't seem should keep them there that long,  
6 I will get a notice about it and recorded in  
7 the chart.

8 Q. So his stay seemed appropriate  
9 to you?

10 A. His stay seemed appropriate to  
11 me and to the hospital.

12 Q. In your course of treatment, Mr.  
13 Earley, I think, questioned you about whether  
14 you knew what he was struck with or anything of  
15 that sort. Based upon the history, was that  
16 consistent with the physical findings that you  
17 found that he was struck by an automobile?

18 A. It could have been caused by  
19 being struck by an automobile, yes.

20 MR. BREIT: I have no further  
21 questions.

22 THE COURT: Mr. Earley.

23  
24 RECROSS EXAMINATION  
25

1 BY MR. EARLEY:

2 Q. Just a couple further questions.

3 Dr. Devereux, you stated that  
4 while he was in the hospital he was treated for  
5 nothing else.

6 A. I said, if you will let me look  
7 there, if there is something there, I don't  
8 think he had specific treatment for any other  
9 condition other than the injuries. He was not --  
10 there are notes that he did not have DT's; that  
11 the scalp wound was slightly infected. Things  
12 like this he was seen consultation by social  
13 services for placement. He was seen by the  
14 physical therapist and I think the only other  
15 thing he complained of was some visual  
16 difficulties, but I don't think that was of any  
17 significance one way or another.

18 Q. Would you consider attending the --  
19 proper term here -- the alcohol education class  
20 treatment?

21 A. It's treatment for alcoholism,  
22 yes, but it's not active treatment that  
23 involves any change in the length of time he  
24 was in the hospital.

25 Q. But he did go to these classes?

1           A.       It's an ideal opportunity. He  
2 is trapped in the hospital. It's a great time  
3 to have him go to alcohol classes. I don't  
4 think it's really treatment in the sense --

5           Q.       I understand that, but he was  
6 encouraged to go by the hospital staff?

7           A.       Of course he was, yes.

8           MR. EARLEY: I have no further  
9 questions.

10          MR. BREIT: Nothing further of  
11 the Doctor.

12          THE COURT: May the Doctor be  
13 excused to return to his medical practice?

14          MR. BREIT: Yes, sir.

15          THE COURT: Thank you very much,  
16 Dr. Devereux.

17          Now, let me ask counsel their  
18 feelings as to a short recess. I am willing to  
19 go on. The jury had an opportunity to step out  
20 very quickly. Would you like to continue?

21          MR. BREIT: I have no objection  
22 if you want to take a short one.

23          THE COURT: Let's take a  
24 five-minute recess.

25          MR. BREIT: If I may for a

1 the Court's permission to do that.

2  
3 (A recess was taken.)

4  
5 THE COURT: Mr. Breit, your next  
6 witness.

7 MR. BREIT: Officer Biernat.

8  
9 R. G. BIERNAT,  
10 a Witness, having been first  
11 duly sworn, was examined and  
12 testified as follows:

13  
14 DIRECT EXAMINATION

15  
16 BY MR. BREIT:

17 Q. Officer Biernat, would you state  
18 your full name for the jury?

19 A. R. G. Biernat.

20 Q. Occupation.

21 A. Norfolk Police Department,  
22 Traffic Division.

23 Q. How long have you been in the  
24 Norfolk Police Department?

25 A. Thirteen years.

Q. And have you been in the traffic bureau all that time?

A. Ten years, ten and a half years.

Q. And during your training as police officer, did you get any type of education or training in accident investigation?

A. Forty hours of basic and eighty hours of accident investigation school.

Q. What basically does that include?

A. Accident investigation on street level such as fatalities, personal injury, high crash scenes.

Q. And how many accidents over the course of your years at the police department have you investigated approximately?

A. About five hundred a year.

Q. Five hundred a year. Did you have an occasion to investigate an accident involving Mr. James King?

A. Yes, sir.

Q. On Tidewater Drive?

A. Yes, sir.

Q. What date did that accident occur?

A. The 3rd of March -- 8th of March.

1 Q. 1980?

2 A. Yes, sir.

3 Q. Where did the accident occur?

4 A. In the 2500 block of Tidewater  
5 Drive.

6 Q. How many lanes of travel are  
7 there on Tidewater Drive at that point?

8 A. Four lanes, two south and two  
9 north.

10 Q. And from your investigation,  
11 could you determine in which direction Mr.  
12 King's vehicle was traveling at the time of the  
13 accident?

14 A. Southbound right-hand lane.

15 Q. That would be from, let's say,  
16 Lakewood towards downtown Norfolk?

17 A. Yes, sir, it would be.

18 Q. In relationship to any other  
19 cross-street, where did the accident occurred?

20 A. Approximately 60 feet north of  
21 Lindenwood landmark would be the St. Julian's  
22 railroad undercross at Tidewater Drive.

23 Q. Lindenwood has a stoplight there?

24 A. Yes, sir.

25 Q. How further up is the underpass



1 at St. Julian's?

2 A. Approximately two blocks.

3 Q. Okay. And what did your  
4 investigation reveal when you arrived at the  
5 scene?

6 A. When I arrived at the scene I  
7 found a '73 four-door Lincoln with heavy damage  
8 to the front that struck a '79 Ford fuel truck,  
9 home delivery type in the rear. Two gentlemen  
10 were on the side of the truck injured. Mr. King  
11 was also standing outside. No skid marks, heavy  
12 damage to the Continental. Moderate damage to  
13 the back of the truck.

14 Q. What size was this Lincoln  
15 Continental?

16 A. Full size, 120-inch base vehicle.

17 Q. Could you describe the size of  
18 the oil truck?

19 A. The oil truck would have been  
20 double axle, single tandem on the rear, gross  
21 weight forty-nine five. I don't know if it was  
22 loaded or not. Had a brown fuel tank on the  
23 back. It was hollow back of maybe two feet from  
24 the bumper to the actual fuel storage  
25 compartment with the wheel stuck between the

1 bumper and tank.

2 Q. So the wheel on the side of the  
3 truck --

4 A. The wheel -- when I meant wheel  
5 I meant the recoil wheel for the hose.

6 Q. Tell us something about the  
7 weather conditions that day. Was it raining?

8 A. Clear and dry to my knowledge.

9 Q. Any roadway slick or wet?

10 A. No, sir.

11 Q. You are certain of that?

12 A. Yes, sir.

13 Q. And what about this wheel? How  
14 far away is that from the back bumper where the  
15 hose goes in?

16 A. Probably 12 inches.

17 Q. From your investigation were you  
18 able to determine whether this oil truck was  
19 parked or moving at the time of the accident?

20 A. It was parked out of gear, not  
21 in gear.

22 Q. It was in the parked position?

23 A. Yes, sir.

24 Q. What about the flasher lights?

25 A. Flasher lights, I don't know if

1 they are on. I know lights are on, but I can't  
2 recall if the lights were actually flashing.

3 Q. Would you have noted it in your  
4 report if the flashers were not on?

5 A. Yes, sir, I would have.

6 Q. And why is that?

7 A. Well, at nighttime accident  
8 lights appear to be important as far as cause  
9 of accidents and if they are not on they are  
10 entered in the accident report and if they are  
11 on they are just taken as an assumption.

12 Q. So there was nothing in your  
13 report to indicate that those flashers were not  
14 on?

15 A. No, sir.

16 Q. And you specifically remember  
17 the rear lights being on?

18 A. Yes, sir.

19 Q. And that's when you arrived at  
20 the scene?

21 A. Yes, sir.

22 Q. Now, did you take a statement  
23 from any of the people at the scene of the  
24 accident?

25 A. Not a written statement, no, sir.

1 Q. Did you talk to the defendant,  
2 Mr. King?

3 A. Yes, sir. He told me that in  
4 front of Mr. Owens, I believe that's the  
5 gentleman's name that is responsible for the  
6 truck, that he didn't see the truck sitting  
7 there.

8 Q. Were you able to determine where  
9 Mr. Dewald was at the time the car struck the  
10 back of the truck?

11 A. The second person that I would  
12 classify as pedestrian was standing on the curb  
13 side to the truck behind Mr. Owens.

14 Q. Okay.

15 A. He was the gentleman that was  
16 responsible for the truck.

17 Q. And you indicated from your  
18 investigation he was standing where exactly in  
19 relationship to the truck?

20 A. I wouldn't actually put him on  
21 the street or on the little knoll between the  
22 sidewalk and the curb. He was next to Mr. Owens  
23 when the vehicle was struck.

24 Q. Okay. Where was he when you  
25 arrived at the scene?

1           A.     He was sitting down on the grass  
2     between the sidewalk and the curbing.

3           Q.     Lying there?

4           A.     I don't remember if he was lying  
5     or sitting.

6           Q.     Could you describe his physical  
7     condition at that time?

8           A.     Elderly gentleman, complaining  
9     of his leg and I believe maybe he had something  
10    wrong with his head. This occurred three years  
11    ago.

12          Q.     But you remember his legs and  
13    his head?

14          A.     I remember his leg and I don't  
15    know if I remember seeing blood or not.

16          Q.     Okay. And did you mark on your  
17    reports that he was injured in your field notes?

18          A.     Injured and carried to the  
19    hospital, yes, sir.

20                   MR. BREIT: I have nothing  
21    further.

22  
23                   CROSS-EXAMINATION

24  
25           BY MR. EARLEY:

1 Q. Officer Biernat, are you  
2 familiar with this section of Tidewater Drive  
3 where the accident occurred?

4 A. Yes, sir, I am.

5 Q. Are you familiar with it because  
6 you drive down that road often?

7 A. Every day.

8 Q. Where this accident occurred --  
9 well, let me back up. Let me ask you a few --

10 MR. BREIT: May I see those,  
11 please.

12  
13 (Counsel approached the bench  
14 and a side bar conference was held.)

15  
16 BY MR. EARLEY:

17 Q. Officer Biernat, this particular  
18 section of Tidewater Drive, the 2500 block is  
19 four lanes; is that correct?

20 A. Correct.

21 Q. There are no feeder lanes?

22 A. No.

23 Q. The right-hand lane southbound,  
24 butts right up against the curb and then  
25 residential houses; is that correct?

1 A. Yes, sir.

2 Q. And is it not true that in this  
3 2500 block there are no parking signs?

4 A. On some of the poles.

5 Q. Are you familiar with that area  
6 enough to say there are no parking signs  
7 between Vista Avenue and Lindenwood Avenue?

8 A. I would say there are no parking  
9 signs there.

10 Q. And is it not true that they are  
11 mounted on the telephone poles, there are no  
12 specific sign poles holding them, but they are  
13 nailed to and mounted on the telephone poles?

14 A. On the poles' red and white  
15 signs.

16 Q. Officer Biernat, based on your  
17 knowledge of traffic conditions and the  
18 education that you mentioned you had in  
19 investigating accidents, in your opinion why is  
20 that a street that would warrant and merit no  
21 parking signs?

22 MR. BREIT: I don't think that  
23 is a proper question to pose to a police  
24 officer in his opinion as to traffic signs. It  
25 doesn't have anything to do with placing those

1 signs and I don't even think he is qualified to  
2 give that opinion. I just don't think it's a  
3 proper question.

4 MR. EARLEY: I think based on  
5 his experience as a traffic policeman and  
6 especially in the streets of Tidewater he would  
7 know why roadways, such as Tidewater Drive, no  
8 parking signs were mounted.

9 THE COURT: Wouldn't that be up  
10 to the traffic engineers of the City as to  
11 traffic flow and how they want it to go more  
12 than the police officer?

13 I think Officer Biernat can  
14 certainly testify as to what was on the scene,  
15 but I don't see how he can testify as to why  
16 the signs were there or not. I sustain the  
17 objection.

18 MR. EARLEY: I withdraw it.

19  
20 BY MR. EARLEY:

21 Q. Based on your field  
22 investigation there was no evidence, was there,  
23 that the defendant was speeding?

24 A. Not of speed, no, sir.

25 Q. In fact, your investigation



1 showed, did it not, that he was proceeding less  
2 than the speed limit as opposed to the speed  
3 limit 35 miles per hour?

4 A. There were no skid marks so I  
5 couldn't determine if there was less or above.

6 Q. But you made no notice of him  
7 exceeding the speed limit?

8 A. I would have had I thought he  
9 had been.

10 Q. You mentioned about the lights  
11 back on the truck. When you arrived at the  
12 scene you stated you don't remember whether the  
13 flashing lights were on or not; is that correct?

14 A. That's correct.

15 Q. But you do remember the rear  
16 lights being on the truck?

17 A. Yes, sir. I believe the truck  
18 had what they call a rack. It's three or four  
19 on the top and then four across the bottom.

20 Q. And that is when you arrived  
21 some moments after the accident; is that  
22 correct?

23 A. Yes, sir.

24 Q. You don't have any firsthand  
25 knowledge, do you, Officer Biernat, as to

1       whether or not the lights were on at the truck  
2       at the time of impact?

3               A.       At the time of impact, no,  
4       because none of the lights were broken so I  
5       couldn't tell if they were broken or not.

6               Q.       I would like for you to clarify  
7       again something that came up on Mr. Breit's  
8       questions. Where did your investigation reveal  
9       that Mr. Dewald was standing at the time of the  
10      accident?

11              A.       Field notes revealed to the  
12      south side of Mr. -- the gentleman's name is  
13      Owens, exactly in point area there was no  
14      debris so I would have to put him on the curb  
15      or on the sidewalk right in that grassy knoll.  
16      That's where he was.

17              Q.       Did your notes reflect that he  
18      was standing north or south of Mr. Owens?

19              A.       I believe it's going to be south.  
20      It would be to the west. Just maybe a little  
21      behind him.

22              Q.       Behind him closer to the houses?

23              A.       Well, Mr. Owens would have been  
24      the first hit and Mr. Dewald would have been  
25      the second.

1 Q. So, Mr. Owens then was standing  
2 closer to the back of the truck, the rear of  
3 the truck than Mr. Dewald?

4 A. As I recall, Mr. Owens was the  
5 gentleman that was reeling the hose back into  
6 the truck. And so it would put Mr. Owens, I  
7 mean, Mr. Dewald, over behind him. He couldn't  
8 be in front of him.

9 Q. And he couldn't be any farther  
10 to the back of the truck because that hose was  
11 at the very back of the truck?

12 A. I can't put him -- at the time I  
13 couldn't put him to the left or right, just  
14 when I was there he was to the right and rear.

15 Q. When you were there and that was  
16 after the accident?

17 A. Yes, sir.

18 Q. Did your notes reveal whether or  
19 not Mr. Dewald was standing actually in the  
20 street beside the truck or up on the curb?

21 A. Again, I can't put him in the  
22 street any more than I could put him standing  
23 on the curb or grass. I put him there as a  
24 reference in the diagram. And he was claimed as  
25 being injured and that's about as far as I went

1 with location. There was no scale put -- the  
2 injuries didn't require a scaled diagram.

3 Q. I understand. You mentioned the  
4 gross weight of this truck as being forty-nine  
5 five. Is that 49 tons?

6 A. Forty-nine thousand five hundred  
7 pounds.

8 Q. Forty-nine thousand five hundred  
9 pounds. I have no further questions.

10 THE COURT: Are you through, Mr.  
11 Breit?

12  
13 REDIRECT EXAMINATION  
14

15 BY MR. BREIT:

16 Q. Officer Biernat, when you  
17 arrived on the scene all the lights on the back  
18 of the truck were on?

19 A. Yes, sir.

20 Q. Were both Mr. Owens and Mr.  
21 Dewald injured at the scene?

22 A. At the scene, yes, sir, visibly  
23 injured.

24 Q. And were they capable of doing  
25 anything to those lights after the accident?

1           A.       The gentleman on the ground  
2 wasn't. He couldn't stand as I recall. The  
3 other gentleman was. His hands were bleeding.  
4 I think his hand was crushed.

5           Q.       You didn't find any blood inside  
6 the truck or anything?

7           A.       No, sir. The only thing I  
8 checked for in the truck was that it wasn't in  
9 a moving mode.

10          Q.       Now, the reason you don't know  
11 the speed of Mr. King's vehicle is because  
12 there were no skid marks, is that correct?

13          A.       No skid marks.

14          Q.       Any evidence of any applying of  
15 brakes of any kind on the part of the defendant?

16          A.       Not that I can find.

17          Q.       Now, one more question. Along  
18 that road they were delivering the oil is there  
19 any place to park there at the home that they  
20 were delivering?

21          A.       Where they were sitting. I mean,  
22 as far as parking lot, the houses, some houses  
23 have spaces but where they were I believe it  
24 was just an opening maybe between two houses  
25 probably the size of the Judge's --

1 Q. But no driveway to pull in?

2 A. No, sir.

3 Q. No other place to deliver oil?

4 A. I wouldn't say so.

5 MR. BREIT: No further questions.

6

7 RECROSS-EXAMINATION

8

9 BY MR. EARLEY:

10 Q. Officer Biernat, do you know the  
11 specific house at which they were delivering on?

12 A. No, sir, that wouldn't be fair  
13 to say because when I got there the house  
14 wasn't all the way in and I wasn't sure which  
15 house they were coming in.

16 Q. So you are not sure whether the  
17 house they were delivering to had a driveway or  
18 not?

19 A. One of the two houses the truck  
20 was between so I don't know which one they  
21 delivered the oil to. I believe it was 2515 or  
22 2517 was the address on the house in front of  
23 the truck, so which one exactly I couldn't say.

24 Q. Officer Biernat, it's true, is  
25 it not, that Mr. King's car hit the oil truck

1 from the rear?

2 A. Yes, sir.

3 Q. Was there any evidence that Mr.  
4 King's truck left the road?

5 A. Mr. King's car?

6 Q. Mr. King's car left the road.

7 A. I found no scuffs on the tire  
8 and found no markings on the curb from the  
9 truck back to Vista which is an intersection  
10 just north of where they were. I saw no  
11 evidence, no torn up grass.

12 Q. So there would be no evidence  
13 that his car ever left the pavement?

14 A. Made a clean shot.

15 Q. Thank you.

16 THE COURT: All right, Officer,  
17 thank you very much. May he be excused?

18 MR. BREIT: Yes, sir, Your Honor.

19 THE COURT: Thank you, Officer.

20 MR. BREIT: Before we call Mr.  
21 Owens, I anticipate him being at least more  
22 than a half hour. I don't know whether the  
23 Court wants to go into direct and cross after  
24 lunch or do it all at once.

25 THE COURT: We can take a lunch

hour any time counsel feels most appropriate.

Do you feel it will be more than a half hour?

MR. BREIT: Probably not be more than a half hour on direct.

THE COURT: Why don't we go on until one o'clock and take the direct and then look at it after that.

DONALD G. OWENS,  
a Witness, having been first  
duly sworn, was examined and  
testified as follows:

DIRECT EXAMINATION

BY MR. BREIT:

Q. Mr. Owens, would you state your full name?

A. Donald Gray Owens.

Q. And how old are you, sir?

A. Forty-five.

Q. And where do you live?

A. 2809 Lafayette Boulevard,  
Norfolk, Virginia.

Q. How long have you lived at that



1 address?

2 A. About four years.

3 Q. And where do you work?

4 A. Bogue Oil Company.

5 Q. How long have you worked for  
6 Bogue Oil?

7 A. Now about five years.

8 Q. At the time of the accident in  
9 March of 1980, how long had you worked for  
10 Bogue Oil?

11 A. Around three years.

12 Q. And what was your occupation at  
13 Bogue? What did you do?

14 A. Truck driver.

15 Q. And what did that entail? What  
16 did that involve?

17 A. Making home deliveries.

18 Q. What kinds of oil?

19 A. Number one and number two.

20 Q. Okay. On March 8th, 1980 do you  
21 recall that day, do you not?

22 A. Yes, sir.

23 Q. And what day of the week was  
24 that?

25 A. Saturday.

A. My brother-in-law met me and we exchanged trucks.

Q. And how did Mr. Dewald come to be with you that day?

A. He come by early that morning and asked me if I wanted him to go with me and I said sure.

Q. Is he a friend of yours?

A. Yes, sir.

Q. How long had you known Mr. Dewald prior to this accident?

A. About two years.

Q. And why did he want to go with you that day?

A. Well, he wasn't working and he helps me a lot when he is not working.

Q. He wasn't working on that Saturday?

A. No, sir, not on Saturday.

Q. Do you know whether he was working at the time of the accident, I mean, like the Friday?

A. He had a regular job at Campbell Paving Company.

Q. But he wasn't working that day

1 Saturday?

2 A. No, sir.

3 Q. Had he been with you the entire  
4 day?

5 A. Yes, sir.

6 Q. Tell the jury basically what you  
7 did on this particular day at the place where  
8 the accident happened, including driving up.  
9 Tell them exactly how you do that process.

10 A. I drove the truck up to 2515  
11 Tidewater, parked on the right-hand side of the  
12 street against the curb. I stopped, put the  
13 blinkers on, put the emergency brake on, put  
14 the clutch in. I went up to the house and made  
15 sure they wanted a hundred gallons of oil. I  
16 went back to the truck and me and Mr. Dewald  
17 pulled the hose to the tank.

18 Q. Okay. Now, where are the flasher  
19 lights on this truck?

20 A. One on each fender on the front  
21 and one in the back. One on each side and the  
22 back.

23 Q. And what do you have to do to  
24 put those lights on?

25 A. Just push a button right at the

1 steering wheel.

2 Q. Did you do that on this  
3 particular day?

4 A. Yes, sir.

5 Q. And is that required to be done  
6 when you are delivering?

7 A. Yes, sir.

8 Q. Had you done all the deliveries  
9 that day?

10 A. Yes, sir.

11 Q. And were those on at the time of  
12 the accident?

13 A. Yes, sir.

14 Q. Now, after you determined that  
15 they were to deliver oil, what did Mr. Dewald  
16 do to help you?

17 A. He got out of the truck and  
18 helped me pull the hose where the tank was on  
19 the side of the house.

20 Q. Was he sitting in the truck when  
21 you went up to the house?

22 A. When I went up to the door he  
23 was.

24 Q. And when did he get out of the  
25 truck?

1                   A.       When I started back down the  
2 steps.

3                   Q.       And where was the oil tank?

4                   A.       On the right-hand side of the  
5 house.

6                   Q.       Were there any driveways or any  
7 place to pull into this particular house?

8                   A.       No, there wasn't.

9                   Q.       Are you certain of that?

10                  A.       I am certain of it.

11                  Q.       And when you pulled the hose up,  
12 how long did it take for you to put the oil in  
13 their tank?

14                  A.       It takes around five minutes.

15                  Q.       How long had you been at this  
16 house prior to the accident?

17                  A.       Probably around 15 minutes.

18                  Q.       After you put the oil in the  
19 tank, what do you do next?

20                  A.       Well, the man paid me. He was  
21 on the sidewalk where I was and Mr. Dewald, he  
22 took the nozzle out of the tank and brought it  
23 back to the truck. And I put them in my pocket.  
24 I was getting ready to push the button to roll  
25 the hose up. You have to do that with your

1 left hand on rear fender and I pushed it to  
2 start winding it up and guiding it with my  
3 right hand and I got hit.

4 Q. Okay. Where was your truck in  
5 relationship to the curb of the traveled  
6 portion of the road?

7 A. Right against the curb.

8 Q. And can you briefly describe to  
9 these people what is next after the curb? Is  
10 there a sidewalk or grass?

11 A. Grassy area and then a sidewalk.

12 Q. How wide is this grassy area?

13 A. I would say a couple feet.

14 Q. And how wide is the sidewalk?

15 A. Probably two or three feet. I  
16 am not sure.

17 Q. Now, where were you standing  
18 when Mr. King struck the back of your truck?

19 A. I was standing at the rear on  
20 the grass with my hand on the rear bumper.

21 Q. And why was your hand on the  
22 rear bumper?

23 A. That is where the button is you  
24 push to roll the hose up.

25 Q. And what were you doing with

1 your right hand?

2 A. I was guiding the hose. There  
3 is an opening there.

4 Q. What was Mr. Dewald doing?

5 A. He was standing right like a  
6 little behind me on the right-hand side. He was  
7 watching me roll the hose up.

8 Q. And where exactly was he  
9 standing? Street, grass or sidewalk?

10 A. He was standing on the grass  
11 area.

12 Q. How far away from the truck?

13 A. I would say a couple feet.

14 Q. And what were the weather  
15 conditions like that day?

16 A. It rained earlier that morning  
17 but it was clear that night and the streets  
18 were dry.

19 Q. You are sure of that?

20 A. I am positive of it.

21 Q. And did you have your lights on  
22 as well?

23 A. Yes, sir.

24 Q. And what happened exactly?

25 A. All I know is we got hit.

1 Q. Okay. And what happened to you?

2 A. I got my finger mashed off on my  
3 left hand.

4 Q. I didn't mean what injuries you  
5 had --

6 THE COURT: I sustain the  
7 objection as to any injuries.

8

9 BY MR. BREIT:

10 Q. Were you knocked to the ground?  
11 Not what was injured, but what physically  
12 happened to you on impact?

13 A. Well, all I know I woke up and  
14 the paramedics were there.

15 Q. Okay. And were you able to  
16 observe Mr. King's car when you woke up?

17 A. Yeah. Yes, sir.

18 Q. And where was his car?

19 A. His front end was into the rear  
20 bumper on the truck.

21 Q. Okay. And what about Mr. Dewald?  
22 Where was he?

23 A. Well, the first time I seen him  
24 he was sitting on, like, on the grass area in  
25 that house back in the yard.



1 Q. Okay. Did you talk to Mr. King  
2 at the scene?

3 A. No, I didn't.

4 Q. Okay. Did you talk to the police  
5 officer at the scene?

6 A. No, I didn't even speak to him  
7 that I remember.

8 Q. What did they do with you? Just  
9 take you to the hospital?

10 A. I had to go to the hospital, yes.

11 MR. BREIT: I think that's all  
12 the questions I have. Answer Mr. Earley, if  
13 you will.

14  
15 CROSS-EXAMINATION

16  
17 BY MR. EARLEY:

18 Q. Mr. Owens, you mentioned Mr.  
19 Dewald was a friend of yours; is that correct?

20 A. Yes, sir.

21 Q. He is not a friend of yours  
22 through work, is he? He is merely a social  
23 friend?

24 A. Just a good friend, yes, sir.

25 Q. Has he ever worked for Bogue Oil

1 Company?

2 A. No, sir.

3 Q. And he was not working for Begue  
4 Oil Company that day?

5 A. No, sir.

6 Q. These times that he would help  
7 you out, you didn't pay him, did you?

8 A. No, sir.

9 Q. He was merely there because he  
10 was your friend and wanted to be with you?

11 A. Yes, sir.

12 Q. How long had he been with you  
13 that day?

14 A. Since that morning about nine  
15 o'clock.

16 Q. And did you testify that you had  
17 switched trucks later on that afternoon?

18 A. Yes, sir.

19 Q. Was this truck you picked up  
20 fully loaded?

21 A. No, sir, it wasn't fully loaded.

22 Q. The second one?

23 A. No, sir.

24 Q. How full was it?

25 A. It probably had about five

1           hundred gallons of oil.

2                   Q.       Now, you mentioned it was parked  
3           in the right-hand southbound lanes; is that  
4           correct?

5                   A.       Yes, sir.

6                   Q.       And it was parked, the wheels  
7           were up close to the curb?

8                   A.       Yes, sir.

9                   Q.       It's true, isn't it, Mr. Owens,  
10          that your truck would have taken up just about  
11          all of that right-hand lane?

12                  A.       Yes, sir.

13                  Q.       And you are aware, are you not,  
14          there are no parking signs down that part of  
15          Tidewater Drive?

16                  A.       Yes, sir.

17                  Q.       Do I understand it from your  
18          testimony that you really don't know much about  
19          what happened on impact?

20                  A.       No, sir, I don't.

21                  Q.       You don't. All right. But you do  
22          remember where you were standing before the  
23          impact?

24                  A.       Yes, sir.

25                  Q.       Is that correct?

1 A. Yes, sir.

2 Q. And as I understand your  
3 testimony, and correct me if I am wrong, you  
4 were at the rear of the truck rolling up the  
5 hose?

6 A. Yes, sir.

7 Q. But you were not standing on the  
8 street?

9 A. No, sir.

10 Q. You were standing up past the  
11 curb on the grass?

12 A. Yes, sir.

13 Q. Working with this bumper and  
14 this hose?

15 A. Yes, sir.

16 Q. Now, as I also understand you,  
17 Mr. Dewald was to your right?

18 A. Standing behind me a little bit  
19 to my right.

20 Q. And to your right would have  
21 been closer to the front of the oil truck?

22 A. Yes, sir.

23 Q. Correct? And he was farther  
24 behind you; is that correct?

25 A. Yes.

1 Q. He was kind of off over here?

2 A. Yes, sir. \*

3 Q. The oil truck here?

4 A. Yes, sir.

5 Q. And you said he was two to three  
6 feet behind you on direct; is that correct?

7 A. Well, yes, sir, he is behind me.

8 Q. How far was he behind you?

9 A. He was standing there watching  
10 me. I didn't know how far he was -- two or  
11 three feet.

12 Q. Okay. That's what I was trying  
13 to nail down two or three feet. If you were on  
14 the grass and he was two or three feet behind  
15 you, that would have put him either on the  
16 sidewalk or beyond, would it not?

17 A. He wasn't on the sidewalk. He  
18 was standing right behind me, though.

19 Q. But he was two to three feet  
20 behind you; is that correct?

21 A. I would say so.

22 Q. When you came to, Mr. Owens, or  
23 let me ask you this, were you rendered  
24 unconscious?

25 A. Yes, I was.

1 Q. When you came to, I believe you  
2 said that Mr. King's car was right up in the  
3 rear of the oil truck; is that correct?

4 A. Yes, it was.

5 Q. In fact, did you say something  
6 about it was stuck in the rear?

7 A. Yes, the wrecker had to pull it  
8 out.

9 Q. The wrecker had to pull it out.  
10 No part of his car was up on the curb, was it?

11 A. I don't know for sure.

12 Q. But he was stuck to the rear of  
13 the oil truck?

14 A. Yes, he was.

15 Q. And his car was on the street,  
16 was it not?

17 A. All of it couldn't have been.

18 Q. Why do you say that?

19 A. Because the right rear fender of  
20 our oil truck has -- it goes around, that was  
21 the part that was bent the most.

22 Q. But you don't recall looking  
23 when you came to where his car was, did you?

24 A. I just seen it stuck into the  
25 oil truck in the bumper.

MR. EARLEY: I have no further questions.

THE COURT: Anything further, Mr. Breit?

REDIRECT EXAMINATION

BY MR. BREIT:

Q. What was this part of the truck, Mr. Owens, that was damaged?

A. The right rear part of the bumper.

Q. Did it go around to the side of the truck as well?

A. Yes.

Q. So the side and the rear was damaged?

A. Yes.

MR. BREIT: Nothing further.

THE COURT: Thank you very much, sir. You may be excused.

MR. BREIT: My last witness is going to be Mr. Dewald. I know he is going to take some considerable time.

THE COURT: I think he probably

1 MR. BREIT: Call James Dewald to  
2 the stand.

3  
4 JAMES L. DEWALD,  
5 the Plaintiff, having been first  
6 duly sworn, was examined and  
7 testified as follows:  
8

9 DIRECT EXAMINATION

10  
11 BY MR. BREIT:

12 Q. Mr. Dewald, would you state your  
13 full name, please.

14 A. James L. Dewald.

15 Q. And how old are you?

16 A. Forty-eight.

17 Q. And where do you live?

18 A. Now?

19 Q. Yes, sir.

20 A. I live on Lafayette Boulevard,

21 2808.

22 Q. How long have you lived there?

23 A. Over a year. About a year.

24 Q. Where were you living at the  
25 time of the accident?



93

1                   A.       At Norview, down at Anchorage  
2 Hotel in a room.

3                   Q.       How long have you been a  
4 resident of the Tidewater area?

5                   A.       I was raised here.

6                   Q.       Okay. All your life?

7                   A.       Yeah.

8                   Q.       At the time of this accident in  
9 March of 1980, were you working?

10                  A.       Yes, sir.

11                  Q.       Where were you employed?

12                  A.       Campbell's Paving.

13                  Q.       How long had you worked for  
14 Campbell's Paving Company prior to this  
15 accident?

16                  A.       A year.

17                  Q.       What type of work did you do for  
18 them?

19                  A.       Put down asphalt and mechanic.

20                  Q.       Could you describe what type of  
21 labor that is?

22                  A.       You have to shovel it to get it  
23 into the parts where you want it and all that.

24                  Q.       Were you on your feet all day?

25                  A.       All day, yes, sir.

1 Q. On the date of this accident,  
2 Saturday, how did you meet up with Mr. Owens,  
3 Donald Owens?

4 A. I went up to see him. We are  
5 buddies and friends and I went up to see him. I  
6 didn't have nothing to do that day and I asked  
7 him could I go with him on the truck and help  
8 him on the truck.

9 Q. You weren't working that day?

10 A. No, sir.

11 Q. What day of the week was it?

12 A. A Saturday.

13 Q. Now, did you go around with Mr.  
14 Owens to these various places to deliver?

15 A. All day.

16 Q. Did you help him while he was  
17 doing this?

18 A. All day.

19 Q. What was your job? What were you  
20 to be doing?

21 A. I just helped him pull the hose.

22 Q. Okay. And he didn't pay you for  
23 that, did he?

24 A. No, sir.

25 Q. Now, tell us something about

1 this trip you were delivering on the day of the  
2 accident, the time of the accident. Had you  
3 been in that truck that day?

4 A. No, sir.

5 Q. Before?

6 A. No.

7 Q. How long before the accident had  
8 you picked up the truck?

9 A. I don't know, just long enough  
10 to take it up there to make that order.

11 Q. Okay. Tell the jury what you  
12 remember happening, what you did when you drove  
13 up in your own words.

14 A. Well, I waited in the truck  
15 until Mr. Owens went up to see if it was, you  
16 knew, right house or whatever; and so when he  
17 came back and he started down the steps I knew  
18 then that it was the right one because I have  
19 been with him all day and so I got out and  
20 helped him pull the hose.

21 Q. What did you do?

22 A. I stood back at the tank with  
23 the end of the hose to make sure it didn't come  
24 out of the tank.

25 Q. Did you take the hose up to the

1 oil tank at the house?

2 A. Yeah, I had the nozzle and he  
3 helped me pull the hose.

4 Q. How long did it take to fill it  
5 up?

6 A. About five minutes.

7 Q. Tell the jury where the truck  
8 was parked in relationship to the side of the  
9 curb.

10 A. It was parked right in front  
11 right up to the curve.

12 Q. Was there any driveway at that  
13 house to pull into?

14 A. No, none.

15 Q. After you filled up the tank  
16 with oil, tell the jury in your own words what  
17 happened.

18 A. Well, Mr. Owens went back and  
19 the man on the sidewalk, the man paid him and I  
20 brought the nozzle back out to the truck so we  
21 wouldn't be dragging in the dirt and stuff.

22 Q. You brought the nozzle back.  
23 Where did you put the nozzle?

24 A. I laid it down beside the truck  
25 on the grass.

1 Q. Okay. Is this the grassy part  
2 that we heard about?

3 A. Between the sidewalk and the  
4 street.

5 Q. Would you describe for us how  
6 you remember that looking, in other words, how  
7 wide was the grass and how wide was the  
8 sidewalk?

9 A. The grass was about three foot  
10 wide.

11 Q. What about the sidewalk?

12 A. It wasn't what a regular  
13 sidewalk.

14 Q. Okay. Which was larger, the  
15 grassy part or the sidewalk part?

16 A. I think the grassy part was, it  
17 looked like it to me.

18 Q. When you put the hose up to the --  
19 brought it back to this grass and laid it down,  
20 then what happened?

21 A. Then Mr. Owens started to push  
22 the button and I hadn't been on that truck and  
23 I wanted to watch him so I kind of stepped back  
24 at a little bit of an angle behind him where I  
25 could see him.

1 Q. And what did you see him doing?

2 A. I seen him push the button and  
3 had the hose up with his other hand on a reel  
4 like.

5 Q. How much of the hose had he  
6 guided up into the truck before the accident  
7 happened?

8 A. I hadn't even seen him move.

9 Q. He just started?

10 A. Just started.

11 Q. Where were you standing in  
12 relationship to the truck?

13 A. Well, like he is standing here.  
14 I was just behind him.

15 Q. Could you tell us how many feet,  
16 maybe, or inches or what?

17 A. Not over a couple. Oh, you mean  
18 behind him?

19 Q. Yes, sir.

20 A. Just as close as I could get to  
21 him --

22 Q. How far away was that from the  
23 truck?

24 A. -- without getting in his way.

25 Q. How far away was that from the

1 truck?

2 A. About three feet, maybe a little  
3 more.

4 Q. Were either of you in the street?

5 A. No, you can't roll the hose up  
6 in the street when it's up to the curb.

7 Q. So neither of you were in the  
8 street?

9 A. Neither one.

10 Q. What happened next?

11 A. Well, the next thing I know the  
12 car hit us and it knocked me out. It messed me  
13 up.

14 Q. Did you get struck by the car?

15 A. I reckon I did because there  
16 wasn't nothing else there.

17 Q. What happened to you on impact?

18 A. It knocked me out.

19 Q. Did it knock you any distance?

20 A. Knocked me up past Mr. Owens  
21 back on the side. And I was in the yard, I  
22 reckon.

23 Q. Were you knocked unconscious?

24 A. Yeah.

25 Q. And how long before you awoke,

1 if you know?

2 A. Well, when I come through the  
3 police was there, the paramedics and all was  
4 there.

5 Q. They were. When you woke up,  
6 where did you see Mr. King's Continental?  
7 Where was that?

8 A. Up in the back of the oil truck  
9 on the right-hand side stuck up in there.

10 Q. Was there any damage to the oil  
11 truck?

12 A. Yeah, bent the bumper and the  
13 back went around and wheel where you put the  
14 hose up.

15 Q. Was the wheel on that side of  
16 the truck?

17 A. The wheel is up in the middle.

18 Q. What kind of damage was there to  
19 that part of the truck?

20 A. That's what I am talking about.  
21 That's where the bumper was bent and all that  
22 back was bent where you couldn't even roll the  
23 hose up.

24 Q. Could you describe the damage to  
25 the jury, where that damage was?



1                   A.       On the back on the right-hand  
2 side.

3                   Q.       How did it prevent the hose from  
4 being drawn up?

5                   A.       I reckon, I don't know, but I  
6 imagine the motor wouldn't pull that wheel, the  
7 drum when you roll the hose on it.

8                   Q.       Now, could you describe what the  
9 weather conditions were that night?

10                  A.       Clear.

11                  Q.       Was the roadway wet?

12                  A.       No.

13                  Q.       Certain of that?

14                  A.       I am positive.

15                  Q.       What about the lights on the  
16 truck? Could you describe if there were any  
17 lights?

18                  A.       They were on and blinkers were  
19 on and everything.

20                  Q.       How do you know that?

21                  A.       Because we kept them on daytime  
22 and all and I seen them blinking.

23                  Q.       Did you see them blinking before  
24 the accident?

25                  A.       Yeah.

1 Q. Did you talk to the police  
2 officer at the scene?

3 A. No.

4 Q. Did you talk to Mr. King at the  
5 scene?

6 A. No.

7 Q. What was injured on your body?

8 A. My legs and my head.

9 Q. Was your head bleeding?

10 A. Yeah.

11 Q. Where did you have cuts on your  
12 head?

13 A. I had one there, put about four  
14 stitches in and big one back there. I think  
15 they put eight in that.

16 Q. What else was hurting you, if  
17 anything?

18 A. My back was sore a little bit,  
19 but my legs was bothering me worse.

20 Q. Did you go to the hospital that  
21 day?

22 A. Went then.

23 Q. Went then. What did they do for  
24 you at the hospital?

25 A. To start with I didn't think

1 they were going to do nothing and then finally  
2 they came in there and that's when they cleaned  
3 me up and put them stitches in.

4 Q. What did you complain to them  
5 about at the hospital?

6 A. My legs and my head.

7 Q. Maybe you can describe to the  
8 jury, as best you can, what it felt like. What  
9 did your legs feel like then?

10 A. They were hurting. They were  
11 aching, just a plain ache.

12 Q. What about your head and your  
13 face? How did that feel? What was wrong with  
14 it? Can you describe it?

15 A. That's where I had the cuts up  
16 there in back of my head and that was hurting,  
17 too.

18 Q. When they treated and released  
19 you at the hospital, how did you get home?

20 A. Called a cab.

21 Q. Okay. Did you have to walk  
22 anywhere?

23 A. No.

24 Q. How did you get --

25 A. Just get in the cab and get out

1 and walk in the house.

2 Q. You did that?

3 A. Yeah.

4 Q. Did you experience any pain?

5 A. A little bit, but it didn't  
6 bother me because I figured everthing would be  
7 all right. They were just bruised.

8 Q. What did you do? Then what did  
9 you do?

10 A. I went to bed.

11 Q. Okay. Why did you decide to go  
12 back to the hospital three days later?

13 A. Well, the pain got so bad I  
14 couldn't stand it no more and my legs done  
15 swelled on up.

16 Q. Describe for the jury what that  
17 pain was.

18 A. It just plain hurt and I just  
19 got so bad I couldn't stand it so I went back.

20 Q. Were you taking any medication  
21 for it?

22 A. No.

23 Q. What were you doing for it?

24 A. Nothing. They didn't give me  
25 nothing.

1 Q. Describe how your legs swelled  
2 up. Can you describe? Explain to the jury.

3 A. They swelled all up all the way  
4 up to above my knees, both of them.

5 Q. Did they have any color to them?

6 A. They turned a little blue, but  
7 that was about the size of that.

8 Q. So then you went back to the  
9 hospital?

10 A. Yeah.

11 Q. And they put you in the hospital  
12 then?

13 A. That's when they put me and kept  
14 me three weeks.

15 Q. During the three weeks in the  
16 hospital, can you describe what it was like?

17 A. Pain.

18 Q. Were you able to walk around  
19 with the pain? Anything that you can tell this  
20 jury that could help them understand what it  
21 was like?

22 A. Well, the pain I couldn't get  
23 out of bed and go no where and do nothing for  
24 myself because I hurt so bad.

25 Q. Was there any other part of your

1 body hurting?

2 A. My back and head wasn't  
3 bothering me then at all.

4 Q. When did they take the stitches  
5 out of your head?

6 A. Well, let me think. When I went  
7 back to the outpatient's part.

8 Q. After you had been released from  
9 the hospital?

10 A. Yeah.

11 Q. Did you keep your stitches in  
12 your face and head the whole time you were in  
13 the hospital?

14 A. Yeah.

15 Q. What did they do for you in the  
16 hospital while you were there? How did they  
17 treat you?

18 A. They treated me fine, nice  
19 people.

20 Q. Well, I mean, did they give you  
21 medication or give you physical therapy?

22 A. Oh, they made me get down and  
23 teach me how to walk again after I done laid  
24 there a while. I didn't have no medication or  
25 nothing.

1 Q. When did they first let you  
2 start to walk?

3 A. I reckon I was in there -- well,  
4 they gave me a wheelchair first. I got to  
5 where I could get in a wheelchair and then they  
6 took me down for walking, I reckon, a little  
7 over a week before I got out.

8 Q. How long did it take you to get  
9 into the wheelchair?

10 A. I had to pull that thing upside  
11 that bed and jump in it.

12 Q. But how long did it take before  
13 you were able to do that?

14 A. Oh, over a week before I could  
15 do that.

16 Q. So it took you a week before you  
17 were able to get into the wheelchair?

18 A. Right.

19 Q. Were you able to get out of the  
20 bed to go to the bathroom or anything?

21 A. No.

22 Q. So you were bedridden?

23 A. Yeah.

24 Q. After you got into the  
25 wheelchair, how long was it before you were

1       able to get up and walk?

2               A.       I had to have a walker. I could  
3 get up and go on that for a few days and then  
4 they would take me downstairs while I was in  
5 the wheelchair to teach me how to walk in the  
6 walker and then gave me a set of crutches. I  
7 couldn't do nothing on those things.

8               Q.       Where did you have to go and do  
9 with the walker?

10              A.       Go down the hallway and somebody  
11 is with you and after you do that one or two  
12 days so many hours, an hour a day or something  
13 like that, then they take you and teach you how  
14 to walk steps with it.

15              Q.       You say you had some problems  
16 with the crutches?

17              A.       Oh, yeah. I couldn't go on them  
18 things because every time I tried to put weight  
19 on my legs I heard something pop in it. I  
20 couldn't go on them.

21              Q.       Were you ever able to learn how  
22 to use the crutches?

23              A.       No, sir.

24              Q.       How did you get around?

25              A.       I ended up on a cane.



1 Q. What kind of cane were those?

2 A. The metal canes that you can  
3 pull out and adjust according to your size.

4 Q. Did you have one of them or two  
5 of them?

6 A. One of them.

7 Q. And how did you use that?

8 A. This girl held on to me over  
9 there and taught me how to balance myself on it.

10 Q. During this period of time were  
11 you in any pain?

12 A. Yeah, all the time.

13 Q. When did that pain go away?

14 A. The biggest one went away four  
15 or five months later.

16 Q. And what was that?

17 A. What?

18 Q. The pain that went away?

19 A. I mean, the real bad pain, and  
20 then it got down. I had pain. It still  
21 bothers me now as far as that goes.

22 Q. So you had bad pain for four or  
23 five months?

24 A. Yeah.

25 Q. Then how did it get better?

1           What kind of treatment did you have?

2                   A.       I would go back over to the  
3           hospital every month.

4                   Q.       You went over there once a month?

5                   A.       Yeah.

6                   Q.       And were they helping you when  
7           you went back over there?

8                   A.       They checked me over and see how  
9           I was doing and told me to get all the exercise  
10          I could.

11                  Q.       Were you having any problems  
12          with any other part of your body besides your  
13          legs?

14                  A.       My back and that was all.

15                  Q.       Okay. When they took the  
16          stitches out of your face and head, did you  
17          have any problems with those?

18                  A.       No, only problem I got is that  
19          scar I kind of look at when I look in the  
20          mirror on my face.

21                  Q.       Where is that scar?

22                  A.       Right there.

23                  Q.       Okay. And does that bother you?

24                  A.       When I looked at it and all.

25                  Q.       Does it give you any problems,

1           that scar?

2                   A.       Just in personality is all.

3                   Q.       But other than that you don't  
4           have any problems?

5                   A.       Don't have no problems.

6                   Q.       What about your knee?

7                   A.       That gives me trouble all the  
8           time.

9                   Q.       What happened to your knee in  
10          the accident?

11                  A.       I don't know. They told me what  
12          they told me. I don't understand all that  
13          medical stuff.

14                  Q.       What's wrong with your knee?

15                  A.       Sometimes it gives out on me now  
16          and I will fall.

17                  Q.       Had you ever hurt your knee  
18          before?

19                  A.       No, not like that.

20                  Q.       Ever had any problems with your  
21          knee before?

22                  A.       No.

23                  Q.       Can you describe what it feels  
24          like now?

25                  A.       What it feels like?

1 Q. Yes, sir.

2 A. I could be walking across there  
3 and it goes away and I go unless it's something  
4 I can grab ahold of.

5 Q. Does it ever hurt other than  
6 giving away?

7 A. Oh, yeah, sometimes it wakes me  
8 up at night hurting my legs.

9 Q. How does it do that?

10 A. Where it's hurting and throbbing  
11 at night sometimes.

12 Q. Do you have that pain now?

13 A. Yeah.

14 Q. Have you had that pain since the  
15 accident?

16 A. Yeah.

17 Q. Did you ever have that type of  
18 thing before this accident?

19 A. No, never did.

20 Q. What about your legs that were  
21 broken? Have they pretty much healed?

22 A. All but they give away on me.

23 Q. I am not talking about your  
24 knees now, I am talking about the bones broken  
25 in your legs.

1 A. Yeah, they don't bother me.

2 Q. Okay. Did you have any bills for  
3 your medical treatment?

4 A. Yeah, right here.

5 Q. Why don't you tell me what they  
6 are?

7 A. This one here is from DePaul.

8 Q. Okay, DePaul Hospital bill.

9 A. And I will give you the whole  
10 works. That's where I was injured.

11 Q. One is the hospital bill and  
12 what is the other ones?

13 You have got emergency room, a  
14 hospital bill?

15 A. That's when I went to the  
16 emergency room.

17 MR. EARLEY: May we approach the  
18 bench?

19 THE COURT: Certainly, come up.

20 MR. BREIT: I would ask they be  
21 marked as Plaintiff's Exhibits 1, 2 and 3.

22 THE COURT: All right, I will  
23 accept the DePaul Hospital bill as Plaintiff's  
24 Exhibit No. 1. And I will staple it together.  
25 This is, I guess, the bill for the

1 hospitalization. DePaul Hospital bill number  
2 two for \$142.30 will be Plaintiff's Exhibit 2.

3 And DePaul Hospital bill in the  
4 amount of \$90 will be Plaintiff's Exhibit 3.

5  
6 BY MR. BREIT:

7 Q. Mr. Dewald, at the time of this  
8 accident you mentioned you were working at  
9 Campbell's Paving?

10 A. Yes, sir.

11 Q. What was your salary there?

12 A. Three fifty an hour.

13 Q. And what would you make a week?

14 A. Average about a hundred and  
15 forty for a full week.

16 Q. And was that based on a 40-hour  
17 week?

18 A. Right.

19 Q. Did that \$140 include any  
20 overtime?

21 A. No, I am paid extra for that.

22 Q. What type of hourly wage would  
23 you get for overtime pay?

24 A. They would pay me the same thing  
25 for overtime. They didn't pay no extra, just

1 straight out, straight time for overtime.

2 Q. As a result of this accident,  
3 when was it before you were able to go back to  
4 work and make this \$140 a week?

5 A. About ten months.

6 Q. Well, do you recall the exact  
7 date that you went back to work or about when  
8 it was?

9 A. I don't know exact date I went  
10 back, no.

11 Q. Well --

12 A. I have been back a year or over  
13 a year.

14 Q. The accident happened in March?

15 A. Yeah.

16 Q. Do you recall whether you went  
17 back before Christmas or not?

18 A. No, it was after Christmas. It  
19 was in '81.

20 Q. And when you went back to work,  
21 were you able to go back to work after in '81?

22 A. Yeah.

23 Q. Did you work at any time during  
24 the period that you were out from the time of  
25 the accident to when you went back ten months

1 later?

2 A. No.

3 Q. Did you have any other  
4 inconveniences or problems as a result of this  
5 accident during this period of time other than  
6 the pain that you told us about?

7 A. Well, no trouble or nothing.

8 Q. Was there anything that you used  
9 to do that you couldn't do ordinarily?

10 A. Well, I ain't got the strength I  
11 used to have. Outside of that I can do all  
12 right.

13 Q. What about during this ten-month  
14 period, was there anything that was different?

15 A. Everything was different. I  
16 couldn't do nothing, except try to keep me  
17 going around.

18 Q. Was there anything in particular  
19 that you couldn't do that you wanted to do?

20 A. A lot of them things.

21 MR. BREIT: I don't think I have  
22 any more questions.

23 THE WITNESS: A whole lot of them.

24  
25 CROSS EXAMINATION



1  
2 BY MR. EARLEY:

3 Q. Mr. Dewald, you have never been  
4 an employee of Bogue Oil Company, have you?

5 A. No, sir.

6 Q. And you never received any money  
7 from Bogue Oil Company, have you?

8 A. No.

9 Q. You were with Mr. Owens on March  
10 8th, 1980, merely as his friend and companion;  
11 is that correct?

12 A. Right.

13 Q. No one made you go with him, did  
14 they?

15 A. No.

16 Q. You went on your own?

17 A. My own free will.

18 Q. Voluntarily; is that correct?

19 A. Right.

20 Q. And you had been with him all  
21 day long; is that right?

22 A. Right.

23 Q. What time did you all start that  
24 morning?

25 A. About nine o'clock.

1 Q. Did you take any breaks during  
2 the day?

3 A. Just time enough to eat and grab  
4 us a sandwich.

5 Q. About how many deliveries did  
6 you make that day?

7 A. Twenty some.

8 Q. And you switched trucks and got  
9 a new truck in the late afternoon, did you not?

10 A. Right.

11 Q. And that had a new kind of fuel  
12 oil?

13 A. Right, it had number one. The  
14 old one had number two.

15 Q. Are you familiar with the area  
16 of Tidewater Drive in which this accident  
17 occurred?

18 A. Yes, sir.

19 Q. Do you drive it fairly  
20 frequently?

21 A. I don't drive.

22 Q. You don't drive?

23 A. No.

24 Q. Do you ride as a passenger in a  
25 car down this area fairly frequently?

1 A. Yeah.

2 Q. Are you familiar with the kind  
3 of highway that Tidewater Drive is?

4 A. Four-way, two lanes each way.

5 Q. Does it have any feeder roads?

6 A. No, sir.

7 Q. Does it have any shoulders where  
8 someone could pull off out of the flow of  
9 traffic?

10 A. No.

11 Q. Does it have any median  
12 in-between the southbound lanes and the  
13 northbound lanes?

14 A. Yeah.

15 Q. It has a median between the  
16 southbound lanes and the northbound lanes?

17 A. Where they can cut across, isn't  
18 that what you call a median?

19 Q. Is there anything dividing the  
20 southbound lanes from the northbound lanes  
21 other than a yellow line?

22 A. No.

23 Q. Just a yellow line?

24 A. Right.

25 Q. Between the two opposing lanes

1 of traffic?

2 A. Until you get up to a stoplight.

3 Q. You are aware -- well, let me  
4 ask you this, were you aware on March 8, 1980,  
5 that there were no parking signs along that  
6 area road where you park?

7 A. Usually when you are on an oil  
8 truck like that they usually stop and turn  
9 their blinkers on. How are you going to  
10 deliver oil to people that needs oil?

11 Q. I understand. My question to you  
12 is were you aware. It doesn't make any  
13 difference what you were doing with respect to  
14 this question, I just want to know whether you  
15 were aware there were no parking signs along  
16 that street there?

17 A. I hadn't paid that much  
18 attention.

19 Q. Are you saying you didn't know?

20 A. I just hadn't paid that much  
21 attention to it.

22 Q. Are you aware there are no  
23 parking signs there now?

24 A. Oh, yeah.

25 Q. You are aware that they are

1           there now?

2                   A.       Yeah.

3                   Q.       You do know, don't you, Mr.  
4       Dewald, that it's not ordinary to park in the  
5       right-hand lane of a four-lane highway when  
6       there is no shoulder?

7                   A.       I ain't going to argue you ain't  
8       supposed to.

9                   Q.       And isn't it true that the  
10      reason we don't do that, common sense tells us  
11      if we park in the middle of a highway there is  
12      a danger?

13                           MR. BREIT:  Objection, Your  
14      Honor.

15                           THE WITNESS:  I already told you  
16      that.

17                           THE COURT:  Just a second.

18                           MR. BREIT:  That's not a proper  
19      question.  It's asking him to base an opinion  
20      on a conclusion that he would be called upon to  
21      reach.  It's a question of fact for the jury  
22      that, I think, really doesn't even have any  
23      relevance to this case.  The question is calling  
24      for an opinion on his part.

25                           THE COURT:  I will sustain the

1 objection.

2  
3 BY MR. EARLEY:

4 Q. Mr. Dewald, when this truck  
5 stopped in front of 2515 Tidewater Drive, did  
6 it stop in the right-hand lane of traffic  
7 heading south?

8 A. Yeah, all the way over the curb.

9 Q. As far as you can remember,  
10 would there have been any room for a car to get  
11 around that truck in the right-hand lane?

12 A. Oh, yeah, plenty of room.

13 Q. Plenty of room left in the  
14 right-hand lane for a car to get around?

15 A. It's got to go left to get  
16 around.

17 Q. And he would be moving in the  
18 left-hand lane to do that?

19 A. Right.

20 Q. But a person couldn't have  
21 stayed in the right-hand lane and gotten around  
22 the oil truck, could they?

23 A. No. How come all them other  
24 people were going around and he didn't?

25 Q. I understand your concern. I

1 just want you to answer my question, and I  
2 think you have. There was no room, was there,  
3 for a car to get around that oil truck if the  
4 car stayed in the right-hand lane?

5 A. No.

6 Q. It had to get in the left-hand  
7 lane?

8 A. No.

9 Q. And that's because the oil truck  
10 occupied all of the right-hand lane, did it not?

11 A. Most of it, yeah.

12 Q. Even though it was right up  
13 against the curb?

14 A. Yeah.

15 Q. How long did you sit in the  
16 truck after the truck parked before you got out?

17 A. Until he went up to the door and  
18 talked to the people and then he come back down,  
19 just a few minutes.

20 Q. And you helped him out; is that  
21 correct?

22 A. Right.

23 Q. You helped him pull the nozzle  
24 up to the house?

25 A. Up to the tank alongside the

1 house.

2 Q. And then you brought the nozzle  
3 back to the truck and laid it down on that  
4 grassy strip between the truck and the sidewalk;  
5 is that right?

6 A. Right.

7 Q. And you were standing behind Mr.  
8 Owens, weren't you?

9 A. Yeah, more or less behind him,  
10 yeah.

11 Q. And you were standing to his  
12 right, were you not?

13 A. To his left the way the traffic  
14 was coming, but we were facing going left.

15 Q. All right. Let's go through this  
16 slowly now. Mr. Owens standing facing the oil  
17 truck; is that correct?

18 A. Correct.

19 Q. And he was at the very rear  
20 where the hoses rolled up; is that correct?

21 A. That's correct.

22 Q. So his left would have been  
23 oncoming traffic?

24 A. That's the side I was on.

25 Q. To his right would have been the



1 front of the oil truck; is that right?

2 A. Right.

3 Q. Now, you were standing behind  
4 him, were you not?

5 A. Yeah. I couldn't get on the  
6 other side. I would be tangled up in the hose.

7 Q. How close to the truck was he  
8 standing?

9 A. Right up to the truck.

10 Q. Was he standing on that grassy  
11 portion?

12 A. Yeah, still on the grass.

13 Q. He wasn't on the street, was he?

14 A. No.

15 Q. He was on the grass and you were  
16 behind him?

17 A. Right.

18 Q. And you heard him testify, did  
19 you not, that you were standing behind him?

20 A. I was.

21 Q. And to his right, isn't that  
22 correct?

23 A. Right, but I was standing on the  
24 same side the traffic was coming because he was  
25 rolling up the hose and if I had been on that

1 side I would have been in the way of the hose,  
2 right.

3 Q. Mr. Dewald, you were in the  
4 courtroom, I believe, when Mr. Owens testified,  
5 were you not?

6 A. That's right.

7 Q. Do you recall his testimony?

8 A. Yeah.

9 MR. BREIT: I am going to have  
10 to object. He answered the question.

11 THE COURT: He just asked him  
12 did he recall his testimony. He hasn't asked  
13 him to comment on it yet.

14 THE WITNESS: Yeah, he just got  
15 left and right mixed up.

16  
17 BY MR. EARLEY:

18 Q. So your explanation of your  
19 discrepancy and between your testimony or your  
20 difference between his testimony is that he was  
21 wrong?

22 MR. BREIT: Objection. He does  
23 not have to testify.

24 THE COURT: I will sustain. He  
25 can't comment as to whether someone else is

1 wrong or not.

2 MR. BREIT: Yes, sir, thank you.

3  
4 BY MR. EARLEY:

5 Q. But it's your contention now,  
6 Mr. Dewald, that you were behind Mr. Owens and  
7 to the left?

8 A. Yeah.

9 Q. Not behind Mr. Owens and to his  
10 right, which would have placed you in front of  
11 the truck?

12 A. I would have been in the way of  
13 the hose rolling up.

14 Q. And you were three feet or more  
15 back from the truck, correct?

16 A. Something like that, two to  
17 three feet. Far enough to be behind him where I  
18 wouldn't be in his way.

19 Q. And the truck came right up  
20 against the curb; is that right?

21 A. That's right.

22 Q. So you were at least three feet  
23 back from the curb?

24 A. Yeah, put it that way.

25 Q. And when you looked to see the

1 location of Mr. King's car after the accident,  
2 it was stuck up in the back of the oil truck?

3 A. Right.

4 Q. Mr. Dewald, you went to the  
5 emergency room the evening of the accident, did  
6 you not?

7 A. Yeah.

8 Q. Did you go in a rescue vehicle?

9 A. No.

10 Q. Did you move the oil truck after  
11 the accident?

12 A. Nope, I don't move it anyway.

13 Q. Was the oil truck moved?

14 A. Yes, sir.

15 Q. Do you know who moved it?

16 A. Mr. Bogue's son, one of them.

17 Q. When you went home the night of  
18 the 8th from the emergency room, did you go  
19 back to your home?

20 A. I went to Mr. Owens.

21 Q. You went to Mr. Owens' home?

22 A. Yeah.

23 Q. And he was the individual  
24 driving the truck that day?

25 A. Right.

1 Q. Did you stay with him the whole  
2 time before you came back to the hospital some  
3 three or four days later?

4 A. I couldn't get no where on  
5 account of my legs.

6 Q. Beg your pardon?

7 A. I couldn't get no where on  
8 account of my legs and down in Norview I lived  
9 upstairs. I couldn't never climb them steps.

10 Q. How long have you been working --  
11 how long had you been working for Campbell's  
12 Paving?

13 A. About a year.

14 Q. Before this accident?

15 A. About a year.

16 Q. About a year. Where did you work  
17 before that?

18 A. I worked -- before that I worked  
19 through the operating engineers, mechanic for  
20 them. And I was working with Tidewater  
21 Construction, Peter Raymond, Dewitt (phonetic)  
22 and all that on the tunnels.

23 Q. You have had many different jobs  
24 in the past few years, would that be correct to  
25 say?

1 A. Yeah.

2 Q. Before you went back to work for  
3 Campbell's Paving after this accident,  
4 full-time, did you go back any time before that  
5 and try to work?

6 A. No, because I knew I couldn't do  
7 it.

8 Q. You were carrying on your daily  
9 routine activities, were you not?

10 A. Laying around and sleeping and  
11 walking, yeah.

12 Q. That's all you were doing?

13 A. That's all.

14 Q. Before you went back to work?

15 A. That's all.

16 Q. And your testimony is you did  
17 that for some ten months?

18 A. Yeah.

19 Q. Laying around, sleeping and  
20 walking?

21 A. And walking, and going to the  
22 hospital.

23 Q. Did you look for any other work  
24 that might not have required as much strenuous  
25 activities?

1 A. I don't know any other work.

2 Q. Did you look for any other work  
3 that might not have required that much  
4 strenuous activity?

5 A. Yeah, I did.

6 Q. You did?

7 A. Yeah.

8 Q. What kinds of things did you  
9 look for?

10 A. Things I thought I could do  
11 where I could sit around and do with my hands.

12 Q. Mr. Dewald, I want to go back  
13 just one second to where you were in  
14 relationship to this truck. You said you were  
15 at least three foot back from the truck  
16 standing?

17 A. Yeah.

18 Q. Your attorney in his opening  
19 argument made the statement that you were on  
20 the sidewalk. That's, in fact, where you were,  
21 isn't it?

22 A. Just about right on the edge of  
23 it.

24 MR. EARLEY: I have no further  
25 questions.

1 THE COURT: Mr. Breit, anything  
2 on redirect?

3 MR. BREIT: No redirect.

4 THE COURT: All right, you may  
5 step down and sit with your counsel.

6 MR. BREIT: That's the  
7 plaintiff's case, Your Honor, and we rest.

8 THE COURT: All right, plaintiff  
9 rests.

10 MR. EARLEY: I would like to  
11 make a motion at this time.

12 THE COURT: All right, ladies  
13 and gentlemen of the jury, if you wouldn't mind  
14 stepping back into the jury room and we will  
15 hear some motions and as soon as we can I will  
16 call you back.

17 MR. EARLEY: If I could, Your  
18 Honor, I have two or three motions to make in  
19 the alternative at this time. The first one  
20 would be that the evidence of the plaintiff be  
21 stricken based upon the fact he has failed to  
22 carry the burden of proof to show that any  
23 injuries that occurred to the plaintiff  
24 occurred as a result of the defendant's car  
25 striking plaintiff.



1                   There has been uncontradicted  
2 testimony from the plaintiff himself that he  
3 was at least three foot back from the car --  
4 from the truck toward the house. Mr. Owens puts  
5 him behind him and to the right which is closer  
6 to the truck. And whether he is closer to the  
7 front or closer to the back, I am not sure  
8 makes much difference at this point, but I  
9 think extremely important that his testimony  
10 and the testimony of Mr. Owens, the only two  
11 people who have firsthand knowledge of where  
12 Mr. Dewald was standing, is that he was at  
13 least three foot back from the truck.

14                   Mr. Breit in opening argument  
15 put him on the sidewalk and Mr. Dewald puts  
16 himself on the sidewalk on the edge. There was  
17 no testimony that Mr. King's vehicle ever left  
18 the street. The policeman testified that he  
19 investigated to find any evidence along the  
20 curb up to the truck to see if the vehicle had  
21 ever gone up the curb. He looked for, I think,  
22 scrape marks and tire marks and found none.  
23 Both of these gentlemen, Mr. Dewald and Mr.  
24 Owens, both testified although they didn't see  
25 the impact when they saw where the car was it

150

1 was stuck up in the back of the oil truck. And  
2 I think it would be completely unreasonable to  
3 try and explain that it ran up on the curb,  
4 somehow bounced back and went back into the oil  
5 truck again. That's the only way I see it could  
6 happen and no one has offered that as any kind  
7 of solution. I feel the burden is on the  
8 plaintiff to show he has got to show he was hit.  
9 He said: I reckon I was hit. Mr. Dewald hasn't  
10 even testified he was hit. He can't say. And I  
11 think he has failed to show the injuries that  
12 Mr. Dewald sustained as a result of Mr. King  
13 running into him.

14 THE COURT: Tell me about the  
15 injuries. We all know that he got injured. I  
16 don't think that lightning struck him. What is  
17 your explanation for him being knocked out and  
18 for his cuts and bruises and whatever? I think  
19 he was either hit or making all this up and I  
20 don't believe the latter at this point.

21 MR. EARLEY: I certainly agree  
22 there is a question mark, but I don't feel the  
23 burden is on the defendant to explain that. I  
24 think that was the plaintiff's burden to  
25 explain that.

1                   THE COURT: I don't want to  
2 steal Mr. Breit's argument, but I seem to think  
3 that he was standing there in a place of what  
4 he considered to be relative safety, he was  
5 watching his friend load the hose when all of a  
6 sudden defendant's automobile runs forcibly  
7 into the rear of the truck. I understand that  
8 the damage was to the right rear.

9                   Now, whether the truck moved or  
10 whether something flew from the car or radiator  
11 or hose blew or something, I don't know. But I  
12 think at this point he has sustained his burden  
13 of showing that he was injured and if you can  
14 show he wasn't injured by anything that was  
15 caused by the car hitting the truck, then I  
16 think that burden shifts to you, but I don't  
17 know what more he can do.

18                  Let's assume poor Mr. Dewald was  
19 killed in this case. That doesn't mean the case  
20 is necessarily over. Someone has the case. They  
21 couldn't testify as to how it happened, but  
22 they could put the police officer and the  
23 police officer would say he investigated the  
24 accident and interviewed witnesses and his  
25 report indicates the man was standing two feet

1 from the truck. I will admit that there is a  
2 missing link, but now whether that missing link  
3 is so serious that I am going to strike the  
4 jury or not I don't know. You haven't convinced  
5 me of it.

6 MR. EARLEY: If we had a  
7 deceased individual we would be in a different  
8 ball park and I understand your analogy. But  
9 here is Mr. Dewald. He did not have any severe  
10 lacerations that you might assume would come if  
11 a car was going as fast as the speed limit on  
12 Tidewater Drive or even ten miles below -- the  
13 speed limit is 35 -- would result, I mean, he  
14 had no lacerations of his legs. The doctor  
15 testified to that. They were merely bruised.

16 THE COURT: He was knocked  
17 unconscious from something.

18 MR. EARLEY: He could merely  
19 have fallen on the sidewalk and hurt his head.

20 THE COURT: What caused him to  
21 fall?

22 MR. EARLEY: That's my point. We  
23 know the car ran into the truck, but no  
24 evidence that it left the pavement and he was  
25 some three feet away.

1                   THE COURT: According the  
2 policeman's testimony, the car could have and  
3 did hit the driver. And the driver's legs were  
4 thrown around like a football, you know, the  
5 legs flying. I don't know. I think he has got  
6 enough to go to the jury right now. Let me hear  
7 you now, Mr. Breit, which is, I am sure, better  
8 than mine.

9                   MR. BREIT: The Court has to  
10 consider the light most favorable to the  
11 plaintiff at this point in the case and the  
12 Court can't ignore the fact that my burden is  
13 only by a greater weight of the evidence. And I  
14 think I have established that without question.  
15 But if we look at all of the circumstantial  
16 evidence in the case it becomes overwhelming.  
17 We have an accident. We have an injury. We have  
18 the testimony that these injuries that he  
19 received were consistent with a strike and a  
20 blow. We have them at the scene of the time of  
21 impact and there was absolutely nothing wrong  
22 with them and the Court and jury can reasonably  
23 infer from those circumstances that that was  
24 the sole proximate cause.

25                   THE COURT: Does it go as far as

1       res ipsa loquitur?

2                   MR. BREIT: It doesn't go so far  
3 as res ipsa loquitur, but under the  
4 circumstances this plaintiff does not have a  
5 duty to prove absolutely that this car hit him.  
6 If he was hit and didn't actually see the car  
7 hit him \*\*

8                   THE COURT: Why wouldn't it go  
9 as far as res ipsa loquitur?

10                  MR. BREIT: Res ipsa is a  
11 situation where the defendant has exclusive  
12 control of --

13                  THE COURT: Of his car.

14                  MR. BREIT: Or his injury or the  
15 product that causes the injury and it would not  
16 happen but for something that was in his  
17 exclusive control.

18                  THE COURT: Was the car in his  
19 exclusive control?

20                  MR. BREIT: The car was in his  
21 exclusive control but the plaintiff wasn't.

22                  THE COURT: The plaintiff  
23 doesn't have to be in his car.

24                  MR. EARLEY: Can I make another  
25 point?

1 THE COURT: Do you want to go on  
2 or take them in order?

3 MR. EARLEY: In order, but I  
4 have one more point.

5 MR. BREIT: All the  
6 circumstances indicate by greater weight of the  
7 evidence that that was the proximate cause of  
8 the accident and, therefore, we are entitled to  
9 proceed.

10 MR. EARLEY: One more point,  
11 Judge, if I could. And that goes back to a line  
12 of questioning I had with Dr. Devereux on cross.

13 The big injury he got in this  
14 case was the legs, I mean, you got the head and  
15 two lacerations, but the big injury we have are  
16 the fracture to the fibula. And one of the  
17 things I brought out on cross with Dr. Devereux,  
18 he has in his first paragraph of, what I would  
19 for lack of a better word label summary,  
20 admission and discharge summary, reading the  
21 second paragraph he had been seen at the time  
22 of the accident with facial abrasions and  
23 contusions and these were treated and evaluated  
24 but had not complained of leg pain at that time.

25 THE COURT: But he did testify

1 today he complained of legs and head, did he  
2 not? I am just asking counsel.

3 MR. EARLEY: I am not sure. He  
4 may have.

5 THE COURT: It's my impression --  
6 no, wait, wait, wait, hold on. You may be right.  
7 I was looking at the wrong testimony. I was  
8 looking at the 3/12/80.

9 MR. EARLEY: It's when he came  
10 back on 3/12, of course, he had this complaint  
11 on legs and that's when the X-ray was taken.

12 THE COURT: I don't have  
13 anything in my notes from Dr. Devereux stating  
14 there is anything in the medical report of  
15 3/8/80 that he complained of his legs.

16 MR. BREIT: Yes, sir, but the  
17 doctor testified previously he did complain of  
18 his legs on 3/8/80 and, in fact, although not  
19 in evidence, it's in the reports and the  
20 plaintiff himself --

21 THE COURT: Mr. Dewald testified  
22 his legs and head hurt him.

23 MR. BREIT: And so did the  
24 police officer.

25 MR. EARLEY: One of the things



1 we have to keep in mind. He testified to that  
2 but he went home and he was home for three or  
3 four days. And then we got him coming back four  
4 days later with fractured legs.

5 THE COURT: Let me interrupt. I  
6 had Officer Biernat saying that plaintiff was  
7 an elderly man complaining of leg and head  
8 injuries and he was taken to the hospital. So I  
9 think apparently from Officer Biernat he  
10 complained of leg and head injuries at the time.  
11 He, himself, has stated on direct that his legs  
12 hurt him at that time. And I think you have got  
13 to realize that this gentleman was out of his  
14 element when he went to the hospital and he may  
15 not have complained that they didn't give him  
16 the care that he would have expected or wanted,  
17 but he got sewed up and he thought he was cured  
18 and the next day he went home and apparently it  
19 was the difference between what -- three days?

20 MR. EARLEY: Eighth through 12th.

21 THE COURT: Four days, and his  
22 legs were hurting, he testified; that there is  
23 no evidence that he was running around or in  
24 any other accidents. The doctor testified that  
25 his legs were swollen, as he did, and that the

1 swelling could have been for a couple of days.  
2 I think that from the evidence that we have got  
3 to assume that those legs were fractured. Now,  
4 it's not like they were cut off or not like  
5 there was compound fracture or something like  
6 that, but he did have a fracture.

7 MR. EARLEY: We wouldn't take  
8 issue with that. I think the medical reports  
9 are clear when he came back on the 12th he had  
10 a fracture.

11 THE COURT: But the evidence is  
12 strong he complained of his legs before and  
13 there is no evidence that he did anything else.

14 MR. EARLEY: In the intervening  
15 time.

16 THE COURT: There is no  
17 intervening cause here. He hasn't been in  
18 another accident.

19 MR. EARLEY: That's true and I  
20 will not argue evidence not before the Court.  
21 But I think just taking the facts of this leg  
22 injury that started out some minor and yet four  
23 days later protruded to a fracture --

24 THE COURT: That's not unusual.  
25 Most whiplashes people don't grab their neck

1 immediately and rush to the hospital. Most  
2 football players go out and celebrate their  
3 victory the night and next day have a hard time  
4 getting out of bed. I don't think that's  
5 unusual. I think that there has been plenty of  
6 evidence that he hurt his legs. The police  
7 officer testified to it. He testified to it,  
8 the doctor testified to it that his injuries  
9 were -- that he had the leg problem and yet he  
10 had other problems caused by something. I think  
11 we have to assume that that something was a car  
12 striking the back of the truck and either the  
13 truck moved forward and he got hit or he was so  
14 close that he got hit or something hit him. You  
15 just don't get knocked unconscious and have  
16 stitches in your head and fractured legs  
17 because the sun came out.

18 MR. EARLEY: I agree, Judge. And  
19 the only other thing is in the motion for  
20 judgment their allegation is that this vehicle  
21 driven by Mr. King struck the plaintiff. And I  
22 just don't think he has carried the burden of  
23 showing that he has.

24 THE COURT: What if this motor  
25 vehicle driven by King struck some part of the

1 vehicle, the truck, and that part of the truck  
2 hit him? That doesn't cause me any concern.

3 MR. EARLEY: But been no  
4 evidence as to what and certainly been no  
5 evidence it was the car as they claimed. It  
6 could be merely Mr. Owens falling back into Mr.  
7 Dewald. They could have certainly pled it that  
8 way.

9 THE COURT: I think they really  
10 don't know.

11 MR. EARLEY: But their  
12 allegation is certainly defensive. At the time  
13 the defendant did carelessly and negligently  
14 did operate his motor vehicle and the same was  
15 caused to strike the plaintiff.

16 THE COURT: Well, I think at  
17 this point I have got to assume that that's  
18 exactly what happened. He was standing close  
19 enough to have been struck. If the truck had  
20 moved forward, if we had evidence of that, that  
21 would be easy.

22 MR. EARLEY: Our evidence is  
23 that it was in gear.

24 THE COURT: I think a heavy  
25 Lincoln Continental going whatever the speed it

1 is has got enough weight it could cause some  
2 damage. At this point, I am going to overrule  
3 your motion. I know you are getting close, but  
4 at this point I am going to overrule your  
5 motion.

6 MR. EARLEY: Can I talk you into  
7 some more?

8 THE COURT: Let me be sure that  
9 I have got all your motions.

10 MR. EARLEY: That's just my  
11 first one.

12 THE COURT: You wanted to strike  
13 the evidence because --

14 MR. EARLEY: Failure to carry  
15 the burden of showing --

16 THE COURT: That the defendant's  
17 car struck the plaintiff?

18 MR. EARLEY: Correct.

19 THE COURT: Okay. And you had  
20 another one.

21 MR. EARLEY: My second is our  
22 assumption of risk that we began to discuss in  
23 chambers.

24 THE COURT: I have looked into  
25 that and thought about it and I will let you

1 Virginia cite on that, but I will give you my  
2 copy.

3 THE COURT: I will be glad to  
4 read that. All right, any further motions?

5 MR. EARLEY: I don't believe so  
6 at this time, Your Honor.

7 THE COURT: All right. I think  
8 we can go over a little further. Sheriff, why  
9 don't we bring the jury back and let the  
10 defendant proceed.

11 All right, Mr. Earley, you have  
12 got seven jurors.

13 MR. EARLEY: The defendant would  
14 now call Mr. James King, the defendant.

15  
16 JAMES C. KING,  
17 the Defendant, having been first  
18 duly sworn, was examined and  
19 testified as follows:

20  
21 DIRECT EXAMINATION

22  
23 BY MR. EARLEY:

24 Q. Mr. King, would you please state  
25 your full name for the Court?

1 A. J. C. King.

2 Q. And, Mr. King, are you a  
3 resident of Norfolk, Virginia?

4 A. Yes, I am.

5 Q. What is your present address?

6 A. I live 2832 Febian Avenue.

7 Q. What section of Norfolk is that  
8 in?

9 A. Febian? Liberty Park.

10 Q. How old are you, Mr. King?

11 A. Fifty-four.

12 Q. And are you employed at the  
13 present time?

14 A. Yes, for the City of Norfolk.

15 Q. And where do you work for the  
16 City of Norfolk?

17 A. I work at Calvary Cemetery.

18 Q. At Calvary Cemetery. Would you  
19 tell the jury just very briefly what you do at  
20 Calvary Cemetery for the City of Norfolk?

21 A. I cut grass, I drive the truck  
22 and I drive the tractor and I dig graves and I  
23 cover up graves.

24 Q. Mr. King, how long have you  
25 worked for the City of Norfolk in this capacity?

1 A. Going on 14 years.

2 Q. Have you ever been fired or laid  
3 off from your job during that time?

4 A. Never have.

5 Q. You have been reporting to work  
6 every day?

7 A. Every day.

8 Q. Do you occasionally work on  
9 Saturdays?

10 A. If that happen to be one of my  
11 Saturdays, long weekends.

12 Q. You work every other Saturday?

13 A. Other Saturday.

14 Q. Do you work at Calvary Cemetery  
15 on every other Saturday?

16 A. Every other Saturday.

17 Q. Were you working on the Saturday  
18 of March 8, 1980?

19 A. I certainly was.

20 Q. Do you remember that day?

21 A. I do, how well I do. I had that  
22 accident.

23 Q. All right. What time did you get  
24 off work that afternoon, Mr. King?

25 A. Four-thirty.



1           A.       No, I didn't do anything else. I  
2 spent about five minutes and then went back.

3           Q.       After you helped him with his  
4 groceries, what did you do then, Mr. King?

5           A.       I went back and got in my car.

6           Q.       When you got in your car, where  
7 were you planning on going then?

8           A.       Going back to Tidewater Drive.

9           Q.       And what was your ultimate plan?  
10 Where did you want to get to?

11          A.       Going home.

12          Q.       All right. And home is in  
13 Liberty Park?

14          A.       Liberty Park.

15          Q.       Now, you said you were going to  
16 get back on Tidewater Drive; is that correct?

17          A.       Yes, sir.

18          Q.       Where would you go on Tidewater  
19 Drive to get to Liberty Park?

20                   What would have been your next  
21 turn?

22          A.       Be on the left-hand side.

23          Q.       What street would that be?  
24 What's the name after you got on Tidewater  
25 Drive and you were going to your home at

1 Liberty Park?

2 A. Uh-huh.

3 Q. On what street would you turn  
4 off of?

5 A. Oh, Church Street, I mean,  
6 Princess Anne Road.

7 Q. Princess Anne Road. And would  
8 Princess Anne Road take you down toward your  
9 home in Liberty Park?

10 A. Yes.

11 Q. When you got back on Tidewater  
12 Drive, were you heading south toward Norfolk or  
13 north toward Ocean View?

14 A. No, sir, I was heading south.

15 Q. And is that toward Norfolk?

16 A. Yes, sir.

17 Q. When you got on Tidewater Drive,  
18 were you in the right-hand southbound lane or  
19 the left-hand southbound lane?

20 A. Left-hand side.

21 Q. Are you sure?

22 A. No, right-hand side.

23 Q. You were in the right-hand side.  
24 Is that the side closest to where the  
25 residential houses are?

1 A. Yeah.

2 Q. As you were traveling down  
3 Tidewater Drive in the right-hand lane, did you  
4 ever switch lanes?

5 A. No, uh-huh.

6 Q. Now, as you were going down  
7 Tidewater Drive, did you see anything unusual?

8 A. The only unusual thing I see  
9 when I looked up I see this huge truck.

10 Q. What kind of truck was it?

11 A. It was an oil truck.

12 Q. And where was it?

13 A. Sitting on the side with no  
14 lights on it. I didn't see any lights.

15 Q. What lane was it in?

16 A. The right-hand side.

17 Q. It was in the right-hand lane?

18 A. Left-hand lane -- right-hand  
19 lane, yeah.

20 Q. Is that the lane you were  
21 driving in?

22 A. Yeah.

23 Q. When you first saw this truck,  
24 Mr. King, approximately how many feet were you  
25 from it?

1 A. Fifty feet from it.

2 Q. And when you first saw it, what  
3 did you do?

4 A. I applied my brakes and I seen  
5 that I was going to hit it anyway and I just  
6 skidded right on into the truck. I couldn't  
7 help it.

8 Q. Was there any reason why you  
9 didn't try to turn into the left-hand lane and  
10 go around it?

11 A. The reason I didn't was the  
12 traffic was coming. And if I had went out there --

13 Q. I understand. Describe to me  
14 what part of your car hit the oil truck.

15 A. My hood. My hood. My whole front  
16 messed up.

17 Q. Did you hit the oil truck  
18 straight on?

19 A. Like that.

20 Q. All right. When you first saw  
21 that oil truck, when you first saw it, did you  
22 see any people standing near it?

23 A. I didn't see anybody.

24 Q. After the accident?

25 A. After the accident then I seen a

1 whole lot of people.

2 Q. All right. You saw a whole lot  
3 of people?

4 A. Yeah, standing investigating.

5 Q. Mr. King, when this accident  
6 happened was it dark?

7 A. It was dark, dark enough to have  
8 on lights.

9 Q. And did you have on your  
10 headlights?

11 A. I had on my headlights.

12 Q. Had it been raining earlier that  
13 day?

14 A. It had been raining earlier in  
15 the day.

16 Q. As far as you can remember, was  
17 the road wet or was it dry?

18 A. Damp as far as I can remember.  
19 It was damp. That's been a long time ago.

20 Q. I understand. When the impact  
21 occurred, when the collision occurred, were you  
22 hurt at all?

23 A. No, I just had a little scratch.  
24 I didn't need to go to no doctor for it, I mean,  
25 the hospital.

1 Q. You were pointing toward your  
2 head?

3 A. Yeah, right there a little spot.

4 Q. And what did that come from?

5 A. Windshield, I bumped my head on  
6 the windshield.

7 Q. Did you have to go to the  
8 emergency room?

9 A. No.

10 Q. Did you go to any doctor?

11 A. No.

12 MR. BREIT: Objection, Your  
13 Honor. It doesn't have any relevance to this  
14 case.

15 THE COURT: What relevance does  
16 it have that he was not hurt?

17 MR. EARLEY: I am not going to  
18 pursue it. I withdraw the question.

19  
20 BY MR. EARLEY:

21 Q. Was your car towed away after  
22 the accident?

23 A. Yes, sir.

24 Q. You were unable to drive it; is  
25 that correct?

1 A. Yes, sir.

2 Q. After the accident occurred, did  
3 you get out of your car or did you remain in  
4 your car?

5 A. Yes, sir, I got out of my car,  
6 but I didn't see nobody hurt.

7 Q. All right. Did you talk to the  
8 policeman?

9 A. I talked with the policeman and  
10 that was the only one.

11 Q. Did he ask you how the accident  
12 happened?

13 A. Yes. I told him.

14 Q. What did you tell him?

15 A. I told him that I put on brake  
16 and my car just skidded into the back of the  
17 truck.

18 Q. Did you give him any reason as  
19 to why you didn't see the truck any earlier?

20 A. No, because the reason why I  
21 didn't see the truck I was looking and when I  
22 looked up I was too close on the truck and I  
23 just couldn't stop.

24 Q. Did you tell him that you didn't  
25 see any lights on the truck?

1 A. I told him that.

2 Q. Mr. King, as you traveled home  
3 from work and after dropping off Mr. Dowgie  
4 daily, do you drive down this section of  
5 Tidewater Drive?

6 A. All the time.

7 Q. Are you familiar with the  
8 section of highway where the accident occurred?

9 A. Yes, sir.

10 Q. You are?

11 A. Yes, sir.

12 Q. How many lanes of traffic are  
13 there at this point?

14 A. Two lanes south and two lanes  
15 north.

16 Q. Is there any feeder lanes in  
17 that area?

18 A. No, no feeder lanes.

19 Q. Are there any shoulders for cars  
20 to pull off on the side?

21 A. No.

22 Q. Are you aware, Mr. King, or do  
23 you know if there are any sort of signs along  
24 the side of the street?

25 A. Yes.



1 Q. What kind of signs are along the  
2 side of the street?

3 A. No parking sign but for a part,  
4 though.

5 Q. Okay. And are they all up and  
6 down that area of Tidewater Drive or just one  
7 there?

8 A. One there and one here.

9 Q. All right. So your testimony is  
10 there is more than one?

11 A. Yeah. It's two of them.

12 Q. Do you normally expect to find  
13 cars or trucks parked in the right-hand lane of  
14 Tidewater Drive?

15 A. Not like that.

16 Q. In all the months and years that  
17 you have been driving it, have you come up on  
18 any parked cars parked in the middle of  
19 Tidewater Drive?

20 MR. BREIT: Objection. I don't  
21 know what that has to do with this accident.

22 THE COURT: What's the reason  
23 for your objection?

24 MR. EARLEY: I am trying to show --

25 THE COURT: I am asking what's

1 the reason for his objection?

2 MR. BREIT: The objection is  
3 what may have happened in all the years this  
4 gentleman has been driving has absolutely  
5 nothing to do with what happened on the day of  
6 this accident.

7 THE COURT: It goes to what he  
8 was expecting and how familiar he was with the  
9 neighborhood. I will allow the question.

10  
11 BY MR. EARLEY:

12 Q. Mr. King, let me ask you the  
13 question over again. Because you knew there  
14 were no parking signs there, in all of your  
15 days of travel up and down this road, had you  
16 ever seen cars parked in the middle of  
17 Tidewater Drive on the right-hand lane?

18 A. No.

19 Q. Were you surprised when you saw  
20 this truck sitting there parked?

21 A. I was, I was.

22 Q. And what's the first thing you  
23 did as soon as you saw that truck?

24 A. Apply my brakes and then started  
25 skidding. And I seen I was going to hit it so I

1 just mashed and went on and skidded in there.

2 Q. I believe I asked you or you  
3 testified, Mr. King, that you didn't see any  
4 lights on this truck. Do you feel like if there  
5 had been lights on this truck you would have  
6 seen them?

7 MR. BREIT: Objection.

8 THE COURT: Sustained.

9 MR. EARLEY: I have no further  
10 questions.

11 MR. EARLEY: Mr. King, answer  
12 any questions Mr. Breit might have for you.

13  
14  
15 CROSS EXAMINATION

16  
17 BY MR. BREIT:

18 Q. Mr. King, what time did you get  
19 off work on this particular day?

20 A. Four-thirty.

21 Q. And what time did the accident  
22 happen?

23 A. The accident happened about  
24 six-thirty.

25 Q. And do you remember testifying

1           A.       Messing with -- waiting for the  
2 man to get straighten about the address where I  
3 went in the back of the truck.

4           Q.       Didn't go anywhere else?

5           A.       No, didn't go anywhere else.

6           Q.       Now, how far as you come down  
7 Tidewater Drive to the scene of the accident do  
8 you have a clear view down Tidewater Drive?

9           A.       Yeah.

10          Q.       How far?

11          A.       All the way up to the stoplight.

12          Q.       A hundred yards?

13          A.       Sure.

14          Q.       More than that, two hundred  
15 yards?

16          A.       You can see a stoplight a long  
17 way.

18          Q.       Three hundred yards?

19          A.       Yeah, about two hundred yards.

20          Q.       As you approached the scene of  
21 the accident you could see over two football  
22 fields straight ahead of you, couldn't you?

23          A.       I didn't see that truck, though.

24          Q.       Do you remember testifying --  
25 well, you testified that you didn't see the

1 truck until you were 50 feet away from it?

2 A. That's right, I didn't. It was  
3 dark.

4 Q. You didn't see the lights, did  
5 you?

6 A. No, no, weren't no lights on the  
7 truck.

8 Q. But you didn't see any lights?

9 A. I didn't see none. If there was  
10 any on there it was so dirty I couldn't see  
11 them.

12 Q. You are testifying you only saw  
13 the truck 50 feet away?

14 A. I only saw the truck.

15 Q. Why didn't you see the truck  
16 before you were 50 feet away if you had three  
17 hundred yards of clear shot?

18 A. Because I just didn't see it,  
19 that was all.

20 Q. Do you remember testifying under  
21 oath when I took your deposition over a year  
22 ago?

23 A. Yeah.

24 Q. And would your recollection of  
25 the events that occurred be more fresh in your

1 was a truck in front of you?

2 A. The truck was sitting there and  
3 I was looking at the light and looked up and  
4 when I looked over to the light there was the  
5 truck. And I couldn't pull around the truck to  
6 go around it because some traffic was coming.

7 Q. Mr. King, you pled guilty to  
8 this offense in traffic Court, didn't you?

9 A. Well, I guess I am guilty.

10 Q. But you did plead guilty, didn't  
11 you?

12 A. I mean, I actually didn't see  
13 the truck until I got up on him.

14 MR. BREIT: I have no further  
15 questions.

16  
17 REDIRECT EXAMINATION

18  
19 BY MR. EARLEY:

20 Q. Mr. King, do you know what it  
21 means to plead guilty? Do you know what it  
22 means to plead guilty?

23 A. I am -- no, I ain't guilty. Is  
24 that what it means? I am messing up.

25 Q. When you went to Traffic Court

1 did you tell the Judge, yes, I am guilty?

2 A. No.

3 Q. What did you tell the Judge?

4 A. I told him I wasn't guilty of it.

5 Q. All right. Mr. Breit just asked  
6 you when you were going down Tidewater Drive  
7 whether you saw the green light at Lindenwood.  
8 You did see the green light, didn't you?

9 A. Yeah. But I didn't see the truck.

10 Q. I understand. And the green  
11 light was right in front of you, was it not?

12 A. Yes, sir, right in front of me.

13 Q. You didn't have to look to the  
14 left or to the right to see the green light,  
15 did you?

16 A. No.

17 MR. EARLEY: I have no further  
18 questions.

19 MR. BREIT: No further questions.

20 THE COURT: You can step down,  
21 sir.

22 MR. EARLEY: The defendant has  
23 no further witnesses.

24 THE COURT: All right.

25 MR. BREIT: We have no rebuttal

1 truck was only 50 feet away when he saw it,  
2 considering the fact he had his lights on, he  
3 is guilty of negligence as a matter of law. The  
4 statute requires three hundred feet of  
5 illumination. He can't get around it.

6 THE COURT: Well, he said that  
7 he had his lights on and he said he did not  
8 have his windshield wipers on and that he was  
9 able to see the vehicle just 50 feet away. Now,  
10 whether the jury advised that or not I don't  
11 know, but I will let that question go to the  
12 jury.

13 MR. BREIT: I would -- well, we  
14 will get into that in instructions.

15 THE COURT: I noted your  
16 objection and exceptions to my ruling.

17 MR. EARLEY: I have a motion to  
18 make at this time. Judge, it's not a new motion.  
19 I would simply renew the motions that I made at  
20 the closing of plaintiff's argument. I want to  
21 ask Your Honor to enter judgment for the  
22 defendant because the plaintiff has failed to  
23 carry the burden of proof to show that the  
24 injuries that Mr. Dewald complains of,  
25 specifically the leg injuries, were not caused



1 by Mr. King's car striking Mr. Dewald as was so  
2 alleged in their motion for judgment. I don't  
3 think he has shown that was the -- that was  
4 indeed the case.

5 And, secondly, I would renew my  
6 motion that the Court find as a matter of law  
7 Mr. Dewald assigned the risk and is barred from  
8 recovery in this case.

9 THE COURT: All right. I am just  
10 reading from Amusement Slides Corporation  
11 versus Lehman, 232 Southeast 2d, 803, which,  
12 very interestingly enough, happened in this  
13 very courtroom and Judge Harper held that  
14 evidence as to whether plaintiff was guilty  
15 assumption of risk was for the jury and the  
16 Court affirmed it and I agree with Judge Harper  
17 and I am going to rule the same way. I think  
18 not to be brought into this case, I don't know  
19 this is a little different than amusement park  
20 case, I don't know that this plaintiff knew  
21 there was a risk. I don't think there is any  
22 evidence today there is a risk of standing  
23 beside an oil truck that is parked beside a  
24 street off-loading, I don't think there is  
25 anything venturesome about that. I don't think

1 there is any evidence certainly that he  
2 appreciated that there was some risk.

3 MR. EARLEY: I would, if I could  
4 respond to that, just call your attention to  
5 the fact he did say that although he did not  
6 know -- did not realize at the time no parking  
7 signs were there, he realized --

8 THE COURT: He knows it now.

9 MR. EARLEY: Right, but he also  
10 said he realized at the time that one should  
11 not park on Tidewater Drive there in that  
12 right-hand lane.

13 And, Judge, my feeling is there  
14 certainly is a danger in parking a car of any  
15 kind, especially a truck that is oversized in  
16 the middle of a four-lane highway when there is  
17 no feeders and shoulders. It's one thing to  
18 argue that they do that because they have to  
19 render the service. And for the sake of  
20 argument let's say that's true just as a fire  
21 truck would have to stop there.

22 THE COURT: Or moving van or  
23 almost any delivery truck.

24 MR. EARLEY: Exactly. That,  
25 however, does not mean it's not a dangerous

1 activity. It simply -- all that says is that it  
2 is -- well, let me back up for a second. I lost  
3 my train of thought. Whether a fire truck had  
4 parked there or not or an oil truck, the fact  
5 that it's in their course of business doesn't  
6 necessarily make it not dangerous. You gave the  
7 illustration of if a fire truck had stopped  
8 there and someone came up to observe would they  
9 be guilty of assumption of risk? Maybe not,  
10 but I think, Judge, it's different when the  
11 fire truck leaves the fire station if someone  
12 says I would really like to go along for the  
13 ride because I am interested in how you fight  
14 fires and how things happen and he goes along  
15 for the ride and standing at the back of this  
16 fire truck in the middle of a four-lane highway  
17 and the fire truck gets hit. If you can show  
18 that that man knew that parking a vehicle,  
19 whether it was necessary or not, created a  
20 danger, and I think Mr. Dewald testified to  
21 that when he said although I didn't know there  
22 were stop signs there at the time I knew one  
23 shouldn't park along Tidewater Drive there, if  
24 we can show he knew that, I think it's only  
25 reasonable to infer he knew it was a danger to

1 park in the middle of the highway and the  
2 danger that he knew of, the only danger that  
3 could result is not a danger of something  
4 falling on the truck or hitting it from the  
5 sides, the danger of stopping along the main  
6 highway is precisely a rear-end collision.

7 THE COURT: That would certainly  
8 be the only danger.

9 MR. EARLEY: Exactly, and that's  
10 the only one we are arguing. I don't personally  
11 see any others.

12 THE COURT: I am not sure he  
13 would think it was a danger to stand in the  
14 sidewalk there. For instance, I will give you  
15 the easy example. If he and his friends  
16 decided to just stop the car and park there and  
17 sit in the car and talk and they were hit from  
18 the rear, I think it would be a lot easier. I  
19 think if friends come along and stop the car  
20 and let him get out, I think they have got a  
21 right to do that, although there is a  
22 no-parking sign. I don't think that he would be  
23 assuming the risk of being struck once he got  
24 out of the car. He would certainly have some  
25 risk as he is sitting there.

1 MR. EARLEY: I agree, the risk  
2 would not be as great. I think you are correct.  
3 But I certainly think when traffic is going at  
4 the speed it goes on Tidewater Drive the limit  
5 is 35 and some people traveling fast or slower  
6 that there is certainly a zone there of danger.

7 THE COURT: I think that's going  
8 to be a jury question for you to argue as to  
9 whether or not your man was negligent. The  
10 driver of the oil truck and the oil truck  
11 company is not before us today. I think the  
12 issue is very limited as far as this case is  
13 concerned is was the defendant negligent and  
14 was his negligence the proximate cause of the  
15 accident. And I think it's that simple. And I  
16 will let it go to the jury on negligence and I  
17 don't think I am going to let it go on  
18 assumption of risk, but I will save that  
19 argument for you until we get back there and  
20 see what instructions you have. At the time  
21 being I am going to overrule the same two  
22 motions that you made at the conclusion of the  
23 plaintiff's evidence.

24 MR. EARLEY: I would note my  
25 objection.

1 THE COURT: Note your objection  
2 and exception to the Court's rule.

3 It looks like we each had a  
4 motion or two. Do you want to go back in the  
5 conference room or do you want her back?

6 MR. BREIT: I usually go through  
7 them and you refuse some and we come out here  
8 while the jury is out and dictate.

9 THE COURT: That would be fine  
10 if that's all right with you.

11 MR. EARLEY: That's all right  
12 with me.

13 THE COURT: Ladies and gentlemen,  
14 I, first of all, will apologize for keeping you  
15 in the jury room so long. The reason for it is  
16 and the reason we can't proceed is that Mr.  
17 Winters, who is helping in the defense of this  
18 matter, went down to my secretary to have some  
19 instructions retyped. And the elevator  
20 malfunctioned and he is locked in the elevator  
21 and they tell us that the fire department or  
22 somebody is on its way to see if they can get  
23 him out.

24 So, with that delay, I assume  
25 that it might be more appropriate for us to

1 not observe the signals and failed to exercise  
2 ordinary care after receiving the signals he  
3 was negligent and took that duty with respect  
4 to signals away from the jury's consideration.

5 And, finally, the Court's  
6 failure to grant an instruction on the  
7 defendant admitting pleading guilty in Traffic  
8 Court should properly have been considered as  
9 an admission of negligence in this case and  
10 failure to instruct was prejudicial to the  
11 plaintiff's claim of guilty of negligence as a  
12 matter of law and the evidence with respect to  
13 his pleading guilty.

14 MR. WINTERS: For the record, he  
15 makes an objection to the granting of any  
16 instructions on the basis that the Court should  
17 have sustained his motion to strike the  
18 plaintiff's evidence and enter summary judgment.

19 MR. EARLEY: Defendant notes his  
20 exception to instruction X4 and X5, both of  
21 which deal with plaintiff's assumption of risk.  
22 G4 reads: The Court instructs the jury that  
23 where the defendant claims assumption of the  
24 risk as a defense, he has the burden of proving  
25 by the greater weight of the evidence that the

1 You may be excused. If you would respond to  
2 your summons in the future and if you have any  
3 questions ask the Sheriff on your way out.  
4 Thank you very much.

5 All right. Now, counsel, I will  
6 give either or both of you a chance to make any  
7 motions that you may want to make at this time.

8 MR. BREIT: I have a motion as  
9 well. I understood Mr. Earley had a motion.  
10 First I will address my motion.

11 THE COURT: You are the  
12 plaintiff. I will let you make yours first.

13 MR. BREIT: I have a motion to  
14 set aside the verdict as clearly excessive, I  
15 mean, clearly inadequate and to award the  
16 plaintiff a new trial on damages alone. This is  
17 permitted pursuant to 18.01+383 and the Court  
18 may, if justified, award a new trial on damages.

19 In this particular case the  
20 verdict is for \$4,500. And further, in the  
21 jury's verdict, it has been itemized as to the  
22 amount of medical bills and an award for lost  
23 wages. It is very clear from that verdict that  
24 the jury did not properly consider the elements  
25 of damage as the Court had instructed them. We



1 are dealing with an individual who has a scar  
2 on his face, the testimony, suffered pain and  
3 suffering for an extended period of time, was  
4 hospitalized for a period of time and the  
5 doctor's testimony indicated excruciating pain  
6 with two broken legs and there is nothing in  
7 that verdict of any kind, especially since it  
8 has been itemized, to indicate that the jury  
9 ever considered the bodily injury, the physical  
10 pain, the mental anguish, the deformity or the  
11 inconvenience. And, in fact, they have only  
12 awarded for two specific elements of damages  
13 and have itemized it.

14 So, this Court cannot say that  
15 they have done anything other than award the  
16 special damages. And they have considered what  
17 they considered to be a fair amount of lost  
18 wages. I am going to have to live with that.  
19 However, it is clearly inadequate based upon  
20 the law and that is that they have failed to  
21 consider any of the other elements of damage  
22 and, therefore, this man is entitled to a new  
23 trial on damages. The issue of liability has  
24 been fixed by the jury. And I can't see any  
25 reason why this Court cannot in its discretion

1 grant a new trial if the verdict is contrary to  
2 the evidence, which it clearly is, in this  
3 particular case.

4 THE COURT: All right, sir.

5 MR. EARLEY: Your Honor, if I  
6 could, would you read again how they had  
7 itemized the damages?

8 THE COURT: The verdict is, We,  
9 the jury, on the issue joined, find in favor of  
10 the plaintiff and assess his damages at \$4,500.  
11 And then they have got in parenthesis, hospital  
12 bills of \$3,629.27. And then under that two  
13 months' lost wages, one thousand one hundred  
14 and twenty, that's in close parenthesis, and  
15 another parenthesis -- there is an error maybe,  
16 if you would like to see it, there is arrow  
17 from that parenthesis to another parenthesis  
18 and it says rounded, close parenthesis, and  
19 another arrow to \$4,500.

20 MR. EARLEY: Judge, I would  
21 oppose Mr. Breit's motion. I think the jury had  
22 ample evidence before them to consider, taking  
23 all factors into consideration in arriving at  
24 monetary damages. They had testimony from the  
25 doctor indicating that, in essence, he was able

1 to do many of the things normal people do after  
2 a shorter amount of time than was the time the  
3 defendant took to go back to work some ten  
4 months. I believe the doctor's testimony was  
5 after a couple months he was able to do what  
6 normal people could do in the routine  
7 activities. I think the jury could very easily  
8 have taken things like that into consideration  
9 in coming up with a lower figure for lost wages  
10 which they itemize. I think they could have  
11 also taken into consideration how his  
12 alcoholism might have affected his recovery.  
13 There were things, the alcoholism, for one of  
14 things, and the testimony on the part of the  
15 plaintiff that he wasn't sure when he went back  
16 to work, ambiguous time slot and the jury,  
17 taking these things into consideration, could  
18 have paid back any number of things which the  
19 plaintiff originally asked for in his damages.  
20 I guess one of which was paid back the most,  
21 the lost wages. The hospital bill was awarded  
22 in full. And, Judge, it's up to the jury to  
23 decide whether they are going to compensate him  
24 for more than his hospital bills, pain,  
25 suffering, et cetera.

1 THE COURT: Well, let me ask you  
2 this, the jury really didn't compensate him for  
3 his hospital bills or his lost wages if you  
4 take the two months' lost wages, assume that's  
5 all the jury thought they still haven't -- well,  
6 I am wrong. My math is wrong.

7 MR. BREIT: No, sir, it's not.  
8 The total verdict is \$4,749 and they rounded it  
9 down.

10 THE COURT: Yeah, my math is  
11 right. They really haven't given him enough to  
12 really pay his hospital bills and lost wages.

13 MR. EARLEY: That may very well  
14 be true, but my point is there was evidence  
15 they had that could very well have enabled them  
16 to do that. They may very well have thought  
17 that some of the bills incurred some of the  
18 time he was in the hospital and some of the  
19 time he lost from work was not all due to this  
20 accident, and some of it was due to perhaps  
21 preexisting conditions and some of it was  
22 perhaps due to his own uncooperation in the  
23 hospital.

24 THE COURT: I don't think there  
25 is any evidence he didn't cooperate.

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1 MR. BREIT: If I may respond to  
2 that, the verdict is clear that's not the case  
3 in this situation. They have given him his  
4 medical bills and so these issues of alcoholism,  
5 which is not supported by the evidence to begin,  
6 is clear that's not what we are dealing with  
7 here because they have given him the full  
8 amount of his medical bill.

9 MR. EARLEY: It may be well what  
10 we are dealing with when they consider how long  
11 he was out of work in lost wages.

12 MR. BREIT: How long he has been  
13 out of work is something that they have  
14 determined that I have to live with of eleven  
15 twenty. That's what they consider to be fair.  
16 But what we are dealing with here is one that  
17 the issue and the total by their own  
18 itemization has been lowered for some unknown  
19 reason, which is not fair to the plaintiff  
20 because they have itemized it as more even on  
21 the special damage. But it's clearly inadequate  
22 if you consider everything else's totality that  
23 there has been no award for anything other than  
24 those two specific special elements and that  
25 has been lowered. It cannot be an adequate

1 verdict and the law is clear that this Court,  
2 if they feel it's contrary to the evidence, may  
3 award a new trial on inadequate damages as well  
4 as excessive damages and that's clearly what we  
5 had in this case. If it had not been itemized  
6 there may be some argument, but in this  
7 situation no question.

8 THE COURT: Your case would have  
9 been a lot weaker if they hadn't of itemized  
10 the medical because the fact that the sum they  
11 come out with is really less than the medical  
12 bills and the two months' lost wages.

13 MR. BREIT: That they have  
14 specifically allowed.

15 MR. EARLEY: Is what we are  
16 talking about here two hundred and some odd  
17 dollars that they have rounded off?

18 THE COURT: That's correct.

19 MR. EARLEY: If Mr. Breit's  
20 motion is to add those two hundred and some  
21 dollars in, I don't vigorously oppose that as  
22 much as I do lifting the whole thing up,  
23 including pain and suffering and setting it  
24 aside completely because the jury didn't have  
25 proper evidence.

1 THE COURT: Well, I think that  
2 his motion is, if I got it down right, you move  
3 to set aside on ground contrary to law and  
4 evidence, inadequate, and grant a new trial on  
5 damages. Is that your motion?

6 MR. BREIT: Yes, sir, Your Honor.

7 THE COURT: All right. I am  
8 going to continue this motion and not rule on  
9 it right now and give you an opportunity, I  
10 don't need any long memorandum, or it can be in  
11 letter form, you might each one set out your  
12 argument to me. Mr. Breit, I will be glad to  
13 hear from you. How long do you think it would  
14 take?

15 MR. BREIT: I can submit a brief  
16 on this issue. It's fairly simple.

17 THE COURT: Not a long brief. I  
18 think, one, I am interested in what Mr. Earley  
19 said that he would be willing to give you a  
20 little more. I don't know whether I have got  
21 the authority. I have authority to go down, but  
22 I don't know if I have authority to go up.

23 MR. BREIT: I don't think this  
24 Court has the power to alter the verdict or to  
25 raise it in any degree. The verdict is \$4,500

1 and my motion is based upon the fact that it's  
2 clear from the form of the verdict that it is  
3 inadequate and it is also inadequate for,  
4 second reason, that the jury has failed to  
5 consider any of the elements of damage which  
6 have been properly proven from the evidence.

7 THE COURT: Well, how long will  
8 it take you to submit a letter or memorandum?  
9 I will give you as much time --

10 MR. BREIT: Ten days.

11 THE COURT: Ten days will be  
12 fine.

13 Mr. Earley, if you want to  
14 respond in ten days. And then I will give him  
15 the last word and you can respond to his in  
16 five.

17 MR. BREIT: Yes, sir, Judge.

18 THE COURT: All right. I will  
19 continue. Do you have any motions, Mr. Earley?

20 MR. EARLEY: Just for the record,  
21 I make a motion to set aside the verdict as  
22 contrary to the law and the evidence.

23 THE COURT: All right. I will  
24 continue your motion also just to be consistent.  
25 But I have recorded that you have moved to set



1       aside as contrary to the law and the evidence.  
2       And I will continue both motions until a later  
3       date and receive your memorandum. All right. Is  
4       there anything further?

5               MR. BREIT:  No, sir.

6               MR. EARLEY:  No, sir.

7               THE COURT:  Thank you, gentlemen,  
8       and we will recess.