

205 VA 373

Record No. 5701

In the
Supreme Court of Appeals of Virginia
at Richmond

VIRGINIA TRANSIT COMPANY

v.

**LOUIS RALPH SCHAIN,
AN INFANT, ETC.**

FROM THE HUSTINGS COURT OF THE CITY OF RICHMOND, PART II

RULE 5:12—BRIEFS

§5. NUMBER OF COPIES. Twenty-five copies of each brief shall be filed with the clerk of this Court and three copies shall be mailed or delivered by counsel to each other counsel as defined in Rule 1:13 on or before the day on which the brief is filed.

§6. SIZE AND TYPE. Briefs shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed record, and shall be printed in type not less in size, as to height and width, than the type in which the record is printed. The record number of the case and the names and addresses of counsel submitting the brief shall be printed on the front cover.

HOWARD G. TURNER, Clerk.

Court opens at 9:30 a. m.; Adjourns at 1:00 p. m.

NOTICE TO COUNSEL

This case probably will be called at the session of court
to be held APR 1964

You will be advised later more definitely as to the date.
Print names of counsel on front cover of briefs.

Howard G. Turner, Clerk

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND.

Record No. 5701

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Tuesday the 11th day of June, 1963.

VIRGINIA TRANSIT COMPANY, Plaintiff in Error,
against

LOUIS RALPH SCHAIN, AN INFANT WHO SUES BY
LAWRENCE SCHAIN, HIS FATHER AND NEXT
FRIEND, Defendant in Error.

From the Hustings Court of the City of Richmond, Part II
M. Ray Doubles, Judge

Upon the petition of Virginia Transit Company a writ of error and *supersedeas* is awarded it to a judgment rendered by the Husting Court of the City of Richmond, Part II, on the 17th day of January, 1963, in a certain motion for judgment then therein depending, wherein Louis Ralph Schain, an infant, etc., was plaintiff and the petitioner and another were defendants; upon the petitioner, or some one for it, entering into bond with sufficient security before the clerk of the said hustings court in the penalty of sixty thousand dollars, with condition as the law directs.

RECORD

page 38 }

Filed by order July 20th 1961.

Teste:

CHAS. R. PURDY, Clerk
By IVA R. PURDY, D. C.

AMENDED MOTION FOR JUDGMENT.

The plaintiff moves the Court for judgment against the defendant for the sum of **FOUR HUNDRED THOUSAND DOLLARS (\$400,000.00)** for compensatory and punitive damages and interest at the rate of 6% per annum from June 7, 1960, as hereinafter stated:

1. That on or about June 7, 1960, the plaintiff, while crossing from the west side of Lafayette Street to the east side of Lafayette Street, just north of its intersection with Cutshaw Avenue in the City of Richmond, Virginia, was struck, hit and thrown by a bus, owned by the defendant, Virginia Transit Company, and operated by Harold Jonathan Iddings, in a negligent, careless, reckless and unlawful manner on, over, and along said Lafayette Street, in a northwardly direction in the City of Richmond, Virginia.

2. That at all times material hereto, Harold Jonathan Iddings, was acting as the agent, servant, and employee of the defendant, Virginia Transit Company, within the course and scope of his employment in and about the business of the said defendant, Virginia Transit Company.

3. That the defendant, Virginia Transit Company, willfully, intentionally and in utter disregard of the safety of the public, retained in its employ the said Harold Jonathan Iddings, and willfully, intentionally and in utter
page 39 } disregard of the safety of the public, allowed him to operate its busses upon the streets of the City of Richmond, Virginia, after the Virginia Transit Company knew that he was a negligent and incompetent driver.

4. That as a direct and proximate result of the carelessness, recklessness and negligence of the defendant, and as a direct and proximate result of the aforesaid willful and intentional acts of the defendant, the plaintiff sustained severe and criti-

cal injuries to his feet, ankles, legs, knees, thighs, arms, abdomen, intestines, and nerves, including, but not limited to, multiple contusions and abrasions, massive avulsion of muscle, skin and tendons of the anterior and lateral surface of the left thigh, compound fracture of the left knee joint with wide exposure of the joint, complete fracture of the upper one-fourth of the left tibia and complete fracture of the upper one-fourth of the left fibula, and contusion to the intestinal tract, with bleeding from the upper intestine, paralysis of the left sciatic nerve with paralysis of the left leg below the knee, and the plaintiff suffered nervous shock and damage to the mind, personality, and body and nervous system; and the plaintiff was temporarily and permanently disabled and has suffered and continues to suffer great pain of body and mind; and the plaintiff has been hospitalized and has been compelled to submit to numerous operations in an effort to be cured of his injuries and to be relieved of his great pain, suffering and disability, and the plaintiff will be compelled, in the future, to undergo medical treatment, hospitalization, surgery, and therapy in an effort to be cured of his injuries and to be relieved of his great pain, suffering and disabilities; and the plaintiff's future earnings have been greatly diminished, and the plaintiff will suffer severe and crippling disabilities and shortening of the left leg in future years; and the plaintiff has suffered and will continue to suffer great hardships, mental depression and inconvenience, and the plaintiff suffered other damages.

WHEREFORE, plaintiff demands judgment against the defendant in the sum of Four Hundred Thousand Dollars (\$400,000.00) for compensatory and punitive damages and costs with interest at 6% per annum from June 7, 1960.

LOUIS RALPH SCHAIN, AN INFANT UNDER THE AGE OF TWENTY-ONE YEARS, WHO SUES BY AND THROUGH HIS FATHER AND NEXT FRIEND, LAWRENCE H. W. SCHAIN.

By Counsel.

SEYMOUR HORWITZ
CHARLES P. ROSNER
HORWITZ AND ROSNER

1215-18 Central National Bank Building
Richmond 19, Virginia
Counsel for the Plaintiff.

page 41 }

* * * * *

ORDER.

This day came the defendant Virginia Transit Company and asked leave to file its motion for a bill of particulars, which leave is granted and the motion filed.

Upon consideration whereof, the Court doth order that the plaintiff file his bill of particulars within ten days from this date, setting forth the following:

1. The particular acts of negligence of Harold J. Iddings upon which the plaintiff intends to rely at the trial with respect to the allegations made in paragraph 1 of plaintiff's Amended Motion for Judgment.

2. The particular acts of negligence of Virginia Transit Company upon which the plaintiff intends to rely at the trial with respect to the allegations made in paragraph 3 of plaintiff's Amended Motion for Judgment.

3. The amount of compensatory damages included in the sum of \$400,000 sued for in plaintiff's Amended Motion for Judgment; and

4. The amount of punitive damages included in page 42 } the sum of \$400,000 sued for in plaintiff's Amended Motion for Judgment.

Enter 7/20/61.

M. R. D., Judge.

* * * * *

page 43 }

* * * * *

MOTION FOR A BILL OF PARTICULARS BY VIRGINIA TRANSIT COMPANY.

The defendant Virginia Transit Company, by counsel, moves the Court to require the plaintiff to file a Bill of Particulars setting forth the following:

1. The particular acts of negligence of Harold J. Iddings upon which the plaintiff intends to rely at the trial with respect to the allegations made in paragraph 1 of plaintiff's Amended Motion for Judgment.

2. The particular acts of negligence of Virginia Transit

Company upon which the plaintiff intends to rely at the trial with respect to the allegations made in paragraph 3 of plaintiff's Amended Motion for Judgment.

3. The amount of compensatory damages included in the sum of \$400,000 sued for in plaintiff's Amended Motion for Judgment; and

4. The amount of punitive damages included in the sum of \$400,000 sued for in plaintiff's Amended Motion for Judgment.

VIRGINIA TRANSIT COMPANY
By RALPH H. FERRELL, JR.
Counsel.

Filed by order July 20th 1961.

Teste:

CHAS. R. PURDY, Clerk
By IVA R. PURDY, D. C.

* * * * *

page 45 }

* * * * *

Filed in clerk's office July 26th 1961.

Teste:

CHAS R. PURDY, Clerk
By IVA R. PURDY, D. C.

BILL OF PARTICULARS.

1. The particular act of negligence of Harold J. Iddings upon which the plaintiff intends to rely at the trial with respect to the allegations made in Paragraph 1 of the plaintiff's Amended Motion for Judgment are as follows: That at the time and place alleged in Paragraph 1 of the Amended Motion for Judgment the said Harold J. Iddings failed to keep a proper lookout, failed to keep the vehicle that he was operating under proper control, and the said Harold J. Iddings was traveling at an excessive rate of speed under the circumstances existing at said time and place.

2. The particular acts of negligence of Virginia Transit Company upon which the plaintiff intends to rely at the trial with respect to the allegations made in Paragraph 3 of the Amended Motion for Judgment are as follows: In addition to the fact that the defendant, Virginia Transit Company, is responsible for the negligent acts of its agent, servant and

employee, Harold Jonathan Iddings, the said defendant, Virginia Transit Company, wilfully, intentionally and in utter disregard of the safety of the public, retained in its employ the said Harold Jonathan Iddings, and wilfully, intentionally and in utter disregard of the safety of the public, allowed him to operate its buses upon the streets of the City of Richmond,

Virginia, after the said Virginia Transit Com-
page 46 } pany knew that on or about September 8, 1956,

Harold Jonathan Iddings, while operating a Virginia Transit Company bus, caused a collision on Patrick Avenue, approximately twenty-five (25) feet east of Meadow Bridge Road when he pulled out from the curb into moving traffic and collided with a vehicle operated by Donald I. Metzger; that on or about November 16, 1957, the said Harold Jonathan Iddings was involved in a collision with a vehicle operated by Edith Pfeiffer on Laurel Street about one hundred Fifty (150) feet south of Franklin Street, while operating a Virginia Transit Company bus; that on November 12, 1958, at approximately 7:45 A. M. the said Harold Jonathan Iddings, while operating a Virginia Transit Company bus, struck and injured James A. Carson, a pedestrian, who was attempting to cross Ninth Street and who was crossing said street in a crosswalk at Ninth and Franklin Streets in the City of Richmond, Virginia.

3. The amount of compensatory damages included in the sum of Four Hundred Thousand Dollars (\$400,000.00) sued for in plaintiff's Amended Motion for Judgment, is Three Hundred Thousand Dollars (\$300,000.00); and the amount of punitive damages included in the sum of Four Hundred Thousand Dollars (\$400,000.00) sued for in plaintiff's Amended Motion for Judgment is One Hundred Thousand Dollars (\$100,000.00).

4. The plaintiff reserves the right to amend his Bill of Particulars at any time if and as he may be so advised.

LOUIS RALPH SCHAIN, AN INFANT UNDER THE AGE OF TWENTY-ONE YEARS, WHO SUES BY HIS FATHER AND NEXT FRIEND, LAWRENCE H. W. SCHAIN,
By Counsel.

SEYMOUR HORWITZ
HORWITZ AND ROSNER
1215-18 Central National Bank Bldg.
Richmond 19, Virginia
Counsel for the Plaintiff.

* * * * *

page 58 }

* * * * *

MOTION TO STRIKE.

The defendant Virginia Transit Company, by counsel, moves the Court to strike paragraph 3 of plaintiff's Amended Motion for Judgment; paragraph 2 of plaintiff's Bill of Particulars filed herein on the 26th day of July, 1961; the following from paragraph 4 of the Amended Motion for Judgment; " * * * and as a direct and proximate result of the aforesaid willful and intentional acts of the defendant * * *"; and all claims for punitive damages in the Amended Motion for Judgment and Bill of Particulars amounting to \$100,000 upon the grounds that all of such allegations (1) are irrelevant and immaterial to this action as a matter of law and (2) are not sufficient in law to warrant the recovery of any of the punitive damages claimed amounting to \$100,000.

VIRGINIA TRANSIT COMPANY
By RALPH H. FERRELL, JR.
Counsel.

Filed in clerk's office August 8th 1961.

Teste:

CHAS. R. PURDY, Clerk
By IVA R. PURDY, D. C.

* * * * *

page 74 }

* * * * *

ORDER.

This day came the parties, by counsel, to be heard upon the following matters pending herein, and the Court heard the argument of counsel therein:

1. The defendant's Demurrer to the Amended Motion for Judgment, and the defendant's Motion to Strike from the said

Amended Motion for Judgment all allegations concerning punitive damages; and the Court doth sustain the said Demurrer to so much of the Amended Motion for Judgment as alleges punitive damages, and doth order the said allegations stricken, for the reason that no wanton conduct on the part of the defendant's agent is alleged; to which action of the Court, the plaintiff by counsel objects and excepts.

2(a). The defendant's Request for Admissions by Lawrence H. W. Schain, father and next friend of the infant, Louis Ralph Schain, the Answer filed thereto, and the defendant's Motion to Strike the said Answer as not being a proper response, and the representation of the plaintiff, by counsel, that Louis Ralph Schain was an infant under seven (7) years of age at the time of the accident; and

(b). The defendant's Interrogatories and the plaintiff's Motion to Quash the said Interrogatories;

And the Court doth overrule the defendant's Motion to Strike the Answer to the defendant's Request for Admissions, and the Court doth sustain the plaintiff's Motion to Quash the defendant's Interrogatories; to all of which action of the

Court, the defendant, objects and excepts.

page 75 } 3. The defendant's Motion to Strike this case from the Trial Docket—upon which the case, on October 10, 1960, was set for trial for September 25, 1961, but in which the parties are not yet at issue due to disposition of the various pleadings heretofore considered herein. And plaintiff's counsel stating that he is now ready to proceed to trial on the unstricken portions of his Amended Motion for Judgment, but defendant's counsel representing to the Court that the defendant's case will be prejudiced by trial of the case on September 25, 1961, the Court doth therefore sustain the defendant's Motion to Strike the case from the Trial Docket; to which action of the Court, the plaintiff, by counsel, objects and excepts.

4. And leave is granted to the plaintiff to file a Second Amended Motion for Judgment herein not at variance with the previous orders of the Court herein, the defendant to file responsive pleadings thereto within 21 days thereafter.

5. And in lieu of granting the defendant's Request for Admissions and the defendant's Interrogatories, the Court doth order that accompanying the plaintiff's Second Amended Motion for Judgment, the plaintiff do file a Bill of Particulars answering to the best of his ascertained information (1) approximately how far north of the intersection the plaintiff was when he was first struck or came in contact with the defendant's bus, and (2) what portion of the said bus first

came into contact with the plaintiff; to which action of the Court, the plaintiff, by counsel, objects and excepts.

Enter 9/19/61.

M. R. D.

* * * * *

page 76 }

* * * * *

Filed in clerk's office December 11th 1961.

Teste:

CHAS. R. PURDY, Clerk
By IVA R. PURDY, D. C.

SECOND AMENDED MOTION FOR JUDGMENT.

The plaintiff moves the Court for judgment against the defendant for the sum of **THREE HUNDRED THOUSAND DOLLARS (\$300,000.00)** as hereinafter stated:

1. That on or about June 7, 1960, the plaintiff, while crossing from the west side of Lafayette Street to the east side of Lafayette Street, just north of its intersection with Cutshaw Avenue, in the City of Richmond, Virginia, was struck, hit and thrown by a bus, owned by the defendant, Virginia Transit Company, and operated by Harold Jonathan Iddings, in a negligent, careless, reckless and unlawful manner on, over and along said Lafayette Street, in a northwardly direction, in the City of Richmond, Virginia.

2. That at all times material hereto, Harold Jonathan Iddings was acting as the agent, servant and employee of the defendnt, Virginia Transit Company, within the course and scope of his employment in and about the business of the said defendant, Virginia Transit Company.

3. That as a direct and proximate result of the carelessness, recklessness and negligence of the defendant, Virginia Transit Company, acting through its agent, servant and
page 77 } employee, Harold Jonathan Iddings, the plaintiff sustained severe and critical injuries to his feet, ankles, legs, knees, thighs, arms, abdomen, intestines and nerves, including but not limited to multiple contusions and

abrasions, massive avulsion of muscle, skin and tendons of the anterior and lateral surface of the left thigh, compound fracture of the left knee joint with wide exposure of the joint, complete fracture of the upper one-fourth (1/4) of the left tibia and complete fracture of the upper one-fourth (1/4) of the left fibula, and contusion to the intestinal tract with bleeding from the upper intestine, paralysis of the left sciatic nerve with paralysis of the left leg below the knee, and the plaintiff suffered severe scarring, and the plaintiff suffered nervous shock and damage to the mind, personality and body and nervous system; and the plaintiff was temporarily and permanently disabled and has suffered and continues to suffer great pain of body and mind; and the plaintiff has been compelled to remain hospitalized over long periods of time and has been compelled to submit to numerous operations in an effort to be cured of his injuries and to be relieved of his great pain, suffering and disability, and the plaintiff will be compelled, in the future, to undergo medical treatment, hospitalization, surgery and therapy in an effort to be cured of his injuries and to be relieved of his great pain, suffering and disabilities; and the plaintiff's future earnings have been greatly diminished, and the plaintiff will suffer severe and crippling disabilities and shortening of the left leg in future years; and the plaintiff has suffered and will continue to suffer great hardships, mental depression and inconvenience, and the plaintiff suffered other damages.

WHEREFORE, plaintiff demands judgment against the defendant, Virginia Transit Company, in the sum of Three Hundred Thousand Dollars (\$300,000.00) for damages resulting to the plaintiff as aforesaid.

LOUIS RALPH SCHAIN, AN INFANT UNDER THE AGE OF TWENTY-ONE YEARS, WHO SUES BY AND THROUGH HIS FATHER AND NEXT FRIEND, LAWRENCE H. W. SCHAIN
By Counsel.

SEYMOUR HORWITZ
CHARLES P. ROSNER
HORWITZ AND ROSNER
1215-18 Central National Bank Building
Richmond 19, Virginia
Counsel for the Plaintiff.

* * * * *

page 79 }

* * * * *

BILL OF PARTICULARS.

The plaintiff, by counsel, in response to the Order of the Court entered herein on the 19th day of September, 1961, states the following as the particulars requested in said Order:

1. The plaintiff was approximately Twenty-five (25) feet north of the north curb line of Cutshaw Avenue when he was first struck by the defendant's bus.
2. The left front portion of the Virginia Transit Company bus first came into contact with the plaintiff in the area near the left front wheel of said bus.

LOUIS RALPH SCHAIN, AN
INFANT, ETC.

SEYMOUR HORWITZ
CHARLES P. ROSNER
HORWITZ AND ROSNER
1215-18 Central National Bank Building
Richmond 19, Virginia
Counsel for the Plaintiff.

Filed in clerk's office December 11th 1961.

Teste:

CHAS. R. PURDY, Clerk
By IVA R. PURDY, D. C.

* * * * *

page 80 }

* * * * *

Filed in clerk's office December 18th 1961.

Teste:

CHAS. R. PURDY, Clerk
By IVA R. PURDY, D. C.

ANSWER AND GROUNDS OF DEFENSE OF DEFENDANT VIRGINIA TRANSIT COMPANY.

The defendant, Virginia Transit Company, by counsel, in answer to plaintiff's second amended motion for judgment, assigns the following grounds of defense:

1. Said defendant denies that it or any of its agents, servants or employees was guilty of any negligence as charged in the second amended motion for judgment.

2. Said defendant denies that plaintiff was injured or damaged in the manner or to the extent alleged in the second amended motion for judgment.

3. Said defendant denies each and every material allegation in the amended motion for judgment.

4. Said defendant says that neither it nor its bus operator, Harold J. Iddings, was guilty of any negligent act or omission which proximately caused or efficiently contributed to the alleged accident and alleged consequent injuries and damages to the plaintiff.

page 81 } 5. Said defendant says that any injuries and damages the plaintiff may have sustained at the time and place alleged in the second amended motion for judgment were directly and proximately caused by the negligence of the plaintiff in failing to exercise ordinary care for his own safety; and in any event, whether or not said defendant or its bus operator, Harold J. Iddings, were negligent, which is denied, the negligence of the plaintiff in failing to exercise ordinary care for his own safety proximately caused or efficiently contributed to whatever injuries and damages the plaintiff may have sustained and bars any recovery in this action.

6. Said defendant says that whatever injuries and damages plaintiff may have sustained at the time and place alleged in the second amended motion for judgment were directly and proximately caused by unexpected, unanticipated and irresponsible actions of an irresponsible child which could not in any wise have been foreseen or prevented by the defendant or any of its agents, servants or employees in the exercise of due care on their part.

7. Said defendant says that whatever injuries and damages the plaintiff may have sustained at the time and place alleged in the second amended motion for judgment were due to an unavoidable accident as far as said defendant is concerned.

8. Said defendant reserves the right to amend its answer

and grounds of defense at any time if and as it may be so advised.

VIRGINIA TRANSIT COMPANY
By RALPH H. FERRELL, JR.
Counsel.

RALPH H. FERRELL, JR.,
HUNTON, WILLIAMS, GAY,
POWELL & GIBSON
1003 Electric Building
Richmond, Virginia
Of Counsel.

* * * * *

page 137 }

* * * * *

Received in clerks office May 31st 1962.

Attest:

CHAS. R. PURDY, Clerk.

MOTION OF VIRGINIA TRANSIT COMPANY TO SET
ASIDE THE VERDICT OF THE JURY.

Virginia Transit Company, by counsel, moves the Court to set aside the verdict of the jury returned for the plaintiff in the sum of Fifty-three Thousand Dollars (\$53,000) on the 8th day of March, 1962, for the following reasons:

1. The verdict is contrary to the law and the evidence in the case;

2. The verdict is without evidence to support it;

3. The evidence failed to show that the defendant's bus operator, Harold J. Iddings, was guilty of any actionable negligence which was a proximate cause of the plaintiff's injuries;

4. The evidence showed that the accident involved in this case resulted solely from the conduct of the plaintiff;

5. The errors committed by the Court in the admission and rejection of evidence over the defendant's objections and exceptions, for the reasons stated in the transcript of the proceedings at the trial to be filed with the Court;

page 138 } 6. The Court erred in overruling defendant's motions to strike at the conclusion of the plain-

tiff's evidence on March 6, 1962, and after the conclusion of the plaintiff's evidence after the plaintiff's case was reopened on March 7, 1962;

7. The Court erred in overruling defendant's motion to strike after all the evidence in the case had been adduced.

8. The case was not properly submitted to the jury under the instructions of the Court and the Court erred in granting, refusing, amending and modifying instructions over the defendant's objections and exceptions, for the reasons stated in the transcript of the proceedings at the trial to be filed with the Court;

9. The jury's verdict is so unreasonable and excessive as to impeach its fairness;

10. The jury's verdict indicates that they failed to heed the Court's instruction to the effect that their verdict was not to be based wholly or in part upon surmise, speculation or sympathy; and

11. The defendant has not had a fair and impartial trial free of material error.

Wherefore, the aforesaid verdict should be set aside and judgment entered for the defendant or, in the alternative, a new trial should be granted.

Respectfully submitted,

VIRGINIA TRANSIT COMPANY
By RALPH H. FERRELL, JR.
Counsel.

RALPH H. FERRELL, JR.,
PERKINS WILSON,
HUNTON, WILLIAMS, GAY,
POWELL & GIBSON
1003 Electric Building
Richmond, Virginia

Of Counsel.

* * * * *

page 140 }

* * * * *

The Court heretofore having heard the argument of counsel upon the defendant's Motion To Set Aside the Verdict of the

Jury, rendered herein on the 8th day of March, 1962, and having considered the same,

Wherefore the Court doth overrule the said Motion to which ruling of the court, counsel for the defendant objects and excepts.

It is, therefore, ordered that the plaintiff, Louis Ralph Schain, an infant, etc., do recover of the defendant, Virginia Transit Company, the sum of \$53,000.00 with interest thereon at the rate of 6% per annum from the 8th day of March, 1962, until paid, and all costs by him expended incident to this proceeding.

Execution of the foregoing judgment is suspended for a period of seventy (70) days.

Enter 1/17/63.

M. R. D.

* * * *

page 141 }

* * * *

ORDER.

The defendant, Virginia Transit Company, by counsel, having advised the Court that it intends to appeal from the Court's order of January 17, 1963, execution of the judgment against the defendant is suspended for a period of four months from January 17, 1963, and if a petition for a writ of error from and *supersedeas* to the aforesaid judgment is presented to the Supreme Court of Appeals of Virginia or one of the justices thereof within the said four months then the operation of the aforesaid judgment is suspended thereafter until the said Court or justice thereof shall have acted upon the said petition; all of the foregoing suspension of execution of judgment upon the condition that the said defendant, or someone for it, on or before the 15th day of February, 1963, shall enter into bond in the penalty of \$60,000 with surety to be approved by the Clerk of this Court conditioned and payable as the law applicable thereto directs.

Enter Feb. 5, 1963.

M. R. D.

* * * * *

page 142 }

* * * * *

Filed March 15, 1963.

Teste:

CHAS. R. PURDY, Clerk
By IVA R. PURDY, D. C.

NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR BY VIRGINIA TRANSIT COMPANY.

The defendant, Virginia Transit Company, by counsel, hereby gives notice of its intention to appeal from the final judgment entered herein on the 17th day of January, 1963, whereby Louis Ralph Schain recovered against Virginia Transit Company a judgment in the amount of Fifty-three Thousand Dollars with interest thereon from the 8th day of March, 1962 until paid and his costs incident to these proceedings.

The defendant assigns as error the following:

1. The trial court's failure to grant the motions of the defendant to strike the plaintiff's evidence at the conclusion of the plaintiff's evidence on March 6, 1962, and after the conclusion of the plaintiff's evidence after plaintiff's case had been re-opened on March 7, 1962, and after all the evidence in the case had been adduced because such evidence (a) failed to show that the defendant's bus operator, Harold Iddings, was guilty of any actionable negligence which was a proximate cause of the plaintiff's injuries, and (b) showed
page 143 } that the accident involved in this case resulted solely from the conduct of the plaintiff.

2. The trial court's failure to set aside the verdict in favor of the plaintiff as contrary to the law and evidence and without evidence to support it.

3. The trial court's failure to set aside the verdict because of errors in the admission and rejection of evidence over the defendant's objections and exceptions.

4. The trial court's refusal to set aside the verdict in favor of the plaintiff, because the case was not properly submitted to the jury under the instructions given by the court and the trial court's errors in amending, granting and refusing instructions over defendant's objections and exceptions.

5. The trial court's giving of Instruction No. 10 on behalf of the plaintiff, because it was an incomplete, inaccurate and misleading statement of the law applicable to the facts shown in evidence and was without evidence to support it.

6. The trial court's giving of Instruction No. 11 on behalf of the plaintiff, because it was erroneous as a matter of law and there was no evidence tending to prove the facts upon which it was based.

7. The trial court's refusal to give Instruction No. VI as requested by the defendant.

8. The trial court's refusal to give Instruction No. V as requested by the defendant, because it was a correct statement of the law applicable to the facts shown in evidence.

9. The jury's verdict is so unreasonable and page 144 } excessive as to impeach its fairness.

10. The jury's verdict indicates that the jury failed to heed the court's instructions that their verdict was not to be based upon surmise, speculation or sympathy.

11. The trial court's failure to set aside the verdict and to enter judgment for the defendant or, in the alternative, to grant a new trial for the reasons hereinabove stated.

Respectfully,

VIRGINIA TRANSIT COMPANY
By RALPH H. FERRELL, JR.
Counsel.

* * * * *

page 145 }

* * * * *

Filed March 27, 1963.

Teste:

CHAS. R. PURDY, Clerk
By IVA R. PURDY, D. C.

ASSIGNMENT OF CROSS-ERROR BY LOUIS RALPH
SCHAIN, AN INFANT, ETC.

The plaintiff, by counsel assigns as cross error in the above styled case the trial court's granting of the defendant's motion to strike Paragraph 3. of the Motion for Judgment and

Paragraph 3. of the plaintiff's Bill of Particulars, because the plaintiff had the right to prove to the jury that the defendant, Virginia Transit Company, willfully, intentionally and in utter disregard of the safety of the public, retained in its employ a known incompetent driver and that said defendant willfully, intentionally and in utter disregard of the safety of the public allowed said known incompetent driver to operate its buses upon the streets of the City of Richmond, Virginia, knowing that said driver had, while operating Virginia Transit Company's buses, been involved in three (3) serious accidents in 1956, 1957 and 1958, and knowing that during this time, said driver ran down a pedestrian in a crosswalk; that said driver on another occasion pulled out from the curb into a stream of moving traffic causing a collision, and that said driver caused a third collision with another vehicle while operating a Virginia Transit Company bus. The plaintiff should have been allowed to go to the jury on the question of punitive damages arising from the intentional, page 146 } reckless and utterly irresponsible and wanton conduct of the bus company in allowing such a known incompetent person to operate its buses, which conduct on the part of the bus company was a proximate cause of the grievous injuries suffered by the plaintiff.

Respectfully,

LOUIS RALPH SCHAIN, AN
INFANT, UNDER THE AGE OF
TWENTY-ONE YEARS, WHO
SUES BY HIS FATHER AND
NEXT FRIEND, LAWRENCE
H. W. SCHAIN.

By SEYMOUR HORWITZ
Counsel.

* * * * *

TRIAL PROCEEDINGS.

Monday, March 5, 1962.

Before: Honorable M. Ray Doubles, Judge, and a jury.

Appearances: Mr. Charles P. Rosner, Mr. Seymour Horwitz, Attorneys for the Plaintiff.

Mr. Ralph H. Ferrell, Jr., Mr. Perkins Wilson, Attorneys for the Defendant.

Robert E. Holland.

* * * * *

page 14 } Mr. Rosner:

* * * * *

page 16 } Louis is going to get on the stand and tell you what happened and I tell you here and now, I have talked with him, he has talked with me, he has told me what happened, but he is confused, but we are going to put him on the stand so you can hear what he thinks happened. Dr. Packer, the doctor who cared for him during most of the time, who was the doctor who took care of the most serious injuries, will testify and tell you that due to the shock, the state of shock that the boy was in, that his recollection of the events is not reliable. However, we do not want to hold anything back from you and we are going to put him on the stand. He is going to tell you how he remembers it, but I am telling you in this opening statement that the girls who saw this are the ones who know and that he, due to his state of shock, his testimony is not going to be reliable on that score.

* * * * *

page 24 } ROBERT E. HOLLAND,

being first duly sworn in behalf of the Plaintiff,
testified as follows:

DIRECT EXAMINATION.

By Mr. Rosner:

Q. Please state your name, sir.

A. Robert E. Holland.

Q. And how old are you, Mr. Holland?

A. Thirty-eight.

Q. What is your occupation?

A. Certified Land Surveyor.

Q. Are you with a firm of certified land surveyors?

A. With the firm of J. K. Timmons, Certified Land Surveyors.

Q. How long have you been engaged—

A. Working with it since 1945; I have been certified since 1956.

Q. Did you at my request make certain measurements of

Robert E. Holland.

the area around the intersection of Lafayette and Cutshaw Avenue in the City of Richmond, Virginia?

A. The measurements were made under my direction.

Q. When were the measurements made?

A. September 13, 1961.

Q. Did you prepare a map or plat of the inter-
page 25 } section and the surrounding area based on the
measurements that you took at that time or that
were taken under your direction at that time?

A. I did, sir.

Q. I show you this plat that is on the board and ask you if you can identify it?

A. That is the plat that was the end result from the measurements we took at your request.

Q. What is the scale of this map?

A. A scale that one inch equals ten feet.

Q. Do you have with you a measuring device that could be used on this map or plat that would make it easy to figure the distances?

A. I do, sir. I have a scale, one inch equals ten feet.

Q. Could you explain which part of that scale—

A. Well, the scale at first is divided into inches, each inch being ten feet, then each inch is divided into ten parts.

The Court: Does the exhibit come in all right?

Mr. Ferrell: I think so, from all I can see.

(The said map was marked and filed as Plaintiff's Exhibit No. 1.)

A. (Continuing) The scale is divided into inches,
page 26 } each inch represents ten feet, then each inch di-
vided into ten parts, each part being one foot.

Q. Can you hand that to me? On the other side of this scale you have numbers closer together, from zero, 2, 4, 6, 8. Does that have anything to do with this?

A. No, it doesn't.

Q. All we are interested in is from zero, 1, 2, 3, 4, each space represents one foot?

A. One foot.

Mr. Rosner: I would like to introduce this scale.

(The said scale was marked and filed as Plaintiff's Exhibit No. 2.)

Robert E. Holland.

By Mr. Rosner:

Q. What indicates the directions on this map?

A. The arrow indicates this is north this way (indicating), south this way, west would be at 90 degrees here; east at 90 degrees here (indicating).

Q. For our purposes, I imagine we will call north straight that way and south the other way so we won't get confused. Does this map fairly and accurately represent the physical conditions of this area when you took the measurements?

A. Yes, it does.

Q. Now, could you point out what the objects page 27 } are on the west side of the street just north of the intersection?

A. On the west side? Well, this is a one-story brick building, 1000 Cutshaw Avenue. There is a wooden picket fence along here. (Indicating map)

A Juror: We can't quite hear you.

A. (Continuing) There is a wooden picket fence here, a chain link fence here and here, a wooden picket fence here, concrete walk here, concrete walk through here, a power line, power pole, there is an eight inch elm tree, street sign there, no parking sign, a sign that says "No Parking—3:00 p. m. to 3:30 p. m. on School Days;" another sign here says, "No Parking—Bus Stop." There is a concrete curb here and a concrete gutter along here. (Indicating map)

Q. I notice that you have what purports to be trees and shrubs. Could you give us the measurements of that little tree on the corner there?

A. This tree? (Indicating)

Q. Yes, sir.

A. As to the width of it?

Q. No, as to the trunk of it.

A. Well, that is an eight inch elm tree.

The Court: Just one minute. Which part of this rule is not the part that is appropriate?

The Witness: This is the top part. (Indicating)
page 28 } The Court: I am scotch taping over the piece of measuring device which is not appropriate.

By Mr. Rosner:

Q. Now, could you give us a simple demonstration as to how to use that scale so we will be straight on that, by mea-

Robert E. Holland.

suring a few distances for us? For example, can you measure the width of Lafayette Street? While you are doing that, show us where the street is, where it starts and where it ends, from one side to the other.

A. These two lines right here represent the six inch concrete curbing; this represents the gutter line; this is a paving from here to the gutter line on the other side, the gutter to the face of the concrete curbing and the back of the curbing at that point.

Q. Could you measure from gutter to gutter for us, please?

A. From gutter to gutter?

Q. I mean, from curb to curb.

A. From curb to curb is 40.2 feet.

Mr. Ferrell: Where is that point he was measuring?

A. That was face of concrete curb to face of concrete curb.

Mr. Ferrell: Where is that?

page 29 } A. That is this point. (Indicating)

Mr. Ferrell: That is how many feet north or south of Cutshaw?

Mr. Rosner: Do you mind if I finish with the witness?

Mr. Ferrell: I will have to object to it. There are certain distances that vary.

The Court: You measured from the northwest corner which is the corner the child was on?

Mr. Rosner: The northwest corner is where the three girls were.

The Court: Will you measure Lafayette Street from curb to curb just north of Cutshaw up far enough so that the curve of the curbs is not involved?

A. This is right where the curb is not involved, it is 40.2 feet.

Mr. Rosner: All right, answer any questions now that Mr. Ferrell asks you.

Robert E. Holland.

CROSS EXAMINATION.

By Mr. Ferrell:

Q. Mr. Holland, how far is it from the north curb line on Cutshaw to the elm tree, the eight inch elm tree on the north-west corner?

page 30 } A. From the north curb line on Cutshaw Street?

Q. Yes, sir.

The Court: To what part of the elm tree?

By Mr. Ferrell:

Q. To the north side of the trunk of the tree.

A. Twenty-five feet.

Q. And then to the north side of the power pole which is north of that, how far is that from the north curb line?

A. To the north? I am afraid I gave you the south side of the elm tree on that last measurement. It is twenty-five feet eight inches to the north side of the elm tree; to the north side of the power pole would be thirty-one feet.

Q. Now, see the power pole on the opposite side of the street? How far is that north of the north curb line of Cutshaw?

A. That would be twenty-eight feet.

Q. That is the north side of the pole?

A. Yes, sir.

Q. Now, how far is it from the concrete walk of that house—we didn't label it, but I will ask you—or the two-story brick apartments—isn't that No. 3924?

A. This apartment here? (Indicating) I have no number for it.

page 31 } Q. You had the number over there, 4001, for the opposite side. I just wondered what reason, if any, you have it on the other side of the street, but you don't have it on the east side.

A. No, sir, I don't.

Q. The unidentified number of the two-story brick apartments, how far is it from the concrete walk there, the west side of the concrete walk, to the curb line?

A. The west side of the concrete walk to the curb line?

Q. No, concrete walk leading up to the two-story brick apartments?

Robert E. Holland.

A. The entrance walk?

Q. That is right, sir.

A. To the curb line, forty feet.

Q. Approximately how long is the bus stop on the north-west corner of Cutshaw and Lafayette?

A. Well, there are three, actually four bus stop signs. The furthest north sign is back here, says, "No Parking 3:00 p. m. to 3:30 p. m. on School Days." Is that the sign you mean?

Q. Did you ascertain how far that bus stop was?

A. I know how far the sign itself is.

Q. You didn't investigate to find out whether page 32 } this was an official bus stop?

A. No, sir, I did not.

Q. How far is it from the north curb line to the first sign "Bus Stop, No Parking"?

A. Seventy-one feet.

The Court: Mr. Ferrell, just in order that there won't be any confusion, when you say the first bus stop, from which way do you mean?

Mr. Ferrell: The first bus sign going north on the west side of the street.

The Court: All right.

By Mr. Ferrell:

Q. How wide is Cutshaw Avenue at this intersection?

A. From curb to curb?

Q. Yes, sir.

A. Any particular place you want me to measure that, Mr. Ferrell?

Q. Either side, or you might give it on both sides, if there is a variation.

A. Thirty-six and a half feet.

Q. That is on the east side?

A. That is on the western side, thirty-six and a half feet on the eastern side.

Q. So that intersection is thirty-six and a half page 33 } feet wide, that is, extended, north and south, and it is forty feet point two—40.2 feet wide going east and west. Right?

A. Right, sir, that is from the curb line, extended.

Q. Are those branches and all you have drawn around the eight inch elm tree, is that to scale, or how did you—

Robert E. Holland.

A. Yes, sir, that is to scale. We measured the overall limb spread of the tree and applied it to the scale.

Q. You did it in September when it had the leaves and so on on the tree?

A. I wouldn't say it had all the leaves but there was foliage on most of the tree.

Q. Well, did you ascertain whether that was approximately the same condition as on June 7, 1960?

A. No, sir, I did not.

Q. Well, they could have put in the curb and gutters, as far as you know?

A. I couldn't testify to that. I saw no indication of any recent construction, but I couldn't testify to that.

Q. What is in the back of this gravel alley on the east side of Lafayette between Cutshaw and Augusta? You have got some opinion, crabapple, spruce trees, and all? Describe to the jury what you saw there. What is back in there?

A. Well, it looks like just a garden. There is a lawn back there and there were various trees planted very
page 34 } neatly.

Q. Some benches, aren't there?

A. I didn't see any benches at the time of the survey.

Q. But there is a chain link fence six feet high there?

A. Yes, sir.

Q. But this area back here is screened from the corner by those trees, isn't that true? When I say screened from the corner, I mean Cutshaw and Lafayette?

A. To a certain extent you can see between some of the trees.

Q. I will ask you this, it might tie in with one other thing. There is a power line indicated on the east side of Lafayette Street. Now, I am talking always between Cutshaw and this gravel alley back here on the north. Isn't there a pole other than the one you have just measured to which is near the corner? Isn't there another pole back in here?

The Court: East or west side of Lafayette?

By Mr. Ferrell:

Q. On the east side. I notice you have one here in the alley.

A. That is right, there is one that sits right in the alley

Officer B. W. Hughes.

page 35 } right here; the next pole is down near Cutshaw.
Q. Well, how far is it from, let's say, the alley,
the south side of the alley to the north curb line
extended of Cutshaw? Let's get that.

A. From the south line of the alley?

Q. Southerly line.

A. To the northern line of the curb at Cutshaw?

Q. North curb line extended, right.

A. 137 feet.

Q. That would be approximately the same distance, too,
on the other side, if your eye is fairly correct, about the same
distance?

A. Yes, sir, it scales the same.

Mr. Ferrell: I believe that is all for now.

By Mr. Ferrell:

Q. You weren't asked to put the entire block of Cutshaw?

A. No, sir, I was not.

Q. Did you happen, by any chance, to measure the distance
of Cutshaw going easterly down to 3001 where Robert Louis
Schain lives?

A. To 3001 eastwardly? I don't know where he lives.

Mr. Ferrell: All right.

(Witness excused.)

page 36 } OFFICER B. W. HUGHES,
being first duly sworn in behalf of the Plaintiff,
testified as follows:

DIRECT EXAMINATION.

By Mr. Rosner:

Q. Please state your name, sir.

A. B. W. Hughes.

Q. What is your occupation?

A. Police Officer for the City of Richmond.

Q. Are you in any particular bureau or branch?

A. In the Traffic Division of the Accident Investigation.

Q. Were you in that Division on June 7, 1960?

A. Yes, sir.

Q. Did you investigate an accident that occurred on June
7, 1960 on Lafayette Street near Cutshaw Avenue involving a

Officer B. W. Hughes.

Virginia Transit Company bus operated by Mr. Iddings and a boy by the name of Louis Schain?

A. Yes, sir.

Q. Could you tell us what time you arrived on the scene?

A. I received a call at 4:33 p. m. and responded from Wickham and Chamberlayne Avenue and when I arrived on the scene there were already two police units there, page 37 } units 11 and 77.

Q. And how long, approximately, did it take you to get there?

A. I would say approximately five minutes.

Q. And when you got there, the boy had already been put in the ambulance?

A. Yes, sir.

Q. Was he gone from the scene?

A. Yes, sir.

Q. Had the bus been moved from the time of the accident until the time you arrived on the scene?

A. No, sir.

Q. Could you describe the physical facts that you found when you got there?

A. When I arrived on the scene, I found this 1940 twin bus was facing north on Lafayette, pulled partially into the east curb with the front of the bus close to the curb and the back of the bus out into the street. The back of the bus was fourteen—from the left side of the bus, from the center of the left side to the east curb, was fourteen feet.

Q. Now, could you describe the marks in the street that you found when you arrived on the scene?

A. There was approximately fifty-seven feet from the first spot of blood to the front bumper of the bus that page 38 } was stopped. That was fifty-seven feet from the north curb line of Cutshaw Avenue to where the bus was stopped.

Q. Were there blood marks in the street that would show the pathway of the bus?

A. There were ten feet of skid marks, of blood and flesh in with the skid marks, indicating that they made contact with the left rear duals and the flesh and blood were only observed on the left outside dual of the bus, in the pavement.

Q. Before you had those marks, which was flesh and blood and skid marks, were there any just plain blood marks?

A. No, sir.

Q. How far from the east curb of Lafayette Street were

Officer B. W. Hughes.

these marks? Was it ten feet of the flesh and blood marks? How far were those from the east curb of Lafayette?

A. Fifteen feet was the first spot of blood on the pavement, from the east curb.

Q. Now, you are getting to the spot of blood. How long did the blood continue?

A. For ten feet.

Q. And then, what was after the blood?

A. I don't exactly understand your question.

Q. Let me put it this way. Were there any markings there that you would call skip marks of blood and then
page 39 } some skid marks, or were the markings all the same?

A. I have two photographs. I don't know whether they have been introduced as evidence.

Q. Not yet.

A. I believe on my photograph it does show there is a slight skip between the end of the flesh and blood in the street, slight skid mark after the skip.

Mr. Rosner: I think those photographs are in the Court papers, Your Honor. I would like to have them.

By Mr. Rosner:

Q. I hand you a photograph and ask you if you can identify it?

A. Yes, sir.

Q. Who took that photograph?

A. I did, sir.

(The said photograph was marked and filed as Plaintiff's Exhibit No. 3.)

Mr. Ferrell: Is that with the bus in the distance?

By Mr. Rosner:

Q. Now, I hand you a second photograph and ask you if you can identify that one?

A. Yes, sir.

Q. Did you take that photograph?

A. Yes, sir.

page 40 } (The said photograph was marked and filed as Plaintiff's Exhibit No. 4.)

Officer B. W. Hughes.

Q. Now, looking at Plaintiff's Exhibit No. 3, could you now tell us about the marks in the street?

The Court: Turn it around so the jury can see it.

A. This one skid mark here, from my investigation, was a skid mark that indicated the blood and flesh on this single skip. This dual skip here, apparently, there was no indication of flesh and blood under this double skid mark.

Q. Now, do you have the measurements in your notes of each of those separate marks?

A. I have ten feet on this one and a total of twelve feet for the two.

Q. Now, look at the other photograph, and could you tell from that photograph whether the right wheel—that is Exhibit No. 4—whether the right wheel left any skid marks at all?

A. No, sir, it did not.

Q. So that the only marks that these photographs show are really marks that were made, pronounced by the fact that there was flesh and blood?

Mr. Ferrell: I will have to object to that kind of leading.

The Court: You are leading, objection sustained.

page 41 } By Mr. Rosner:

Q. There were no skid marks, you testified to, as far as the right tires were concerned. Is that correct?

A. That is correct.

Q. Now, were there skid marks as far as the left tires, or were there other kinds of marks?

A. Restate your question, please.

Q. Were the marks left by the left tire skid marks, what you would call skid marks, or blood marks?

A. On this single mark here it was evidence of both.

Q. Now, when you arrived on the scene, did you attempt to obtain the names of witnesses to the accident?

A. Yes, sir.

Q. Could you give us the names—

Mr. Ferrell: I will have to object to that.

The Court: Objection sustained.

Officer B. W. Hughes.

By Mr. Rosner:

Q. Did you speak with Mr. Iddings, the operator of the bus?

A. Yes, sir.

Q. Tell us what he told you.

Mr. Ferrell: I will have to object to that.

The Court: We will take a recess.

page 42 } In Chambers:

The Court: All right, state the grounds for your objection.

Mr. Ferrell: It is all hearsay and under the Brickhouse Decision, as I read it, such statements cannot be repeated by the investigating officer, *Brickhouse v. Virginia Transit Company*; hearsay.

Mr. Rosner: The bus driver was the operator of the bus for the Virginia Transit Company, agent for the Virginia Transit Company, and he was the driver of the bus. The officer arrived on the scene, from the evidence so far, shortly after the accident. Any statement made by the driver to the officer would be within the *res gestae*, number one. Number two, it would be a statement of the agent of the Defendant.

The Court: Do you have authority to make statements?

Mr. Rosner: As far as having authority to make statements on behalf of the Defendant, I don't know what the authority is, but any statement made by a participant on the scene shortly after the event occurred would certainly be within the *res gestae*.

Mr. Ferrell: He hasn't gotten within the *res gestae* and this case took that up, if I recall the right case, page 43 } but it says it is not admissible.

Mr. Rosner: It seems that any statement made by the operator at the scene of the accident is certainly admissible in evidence.

The Court: No more so than any other witness.

Mr. Rosner: Well, any statement made by the participant in the event is admissible in evidence if the statement is made shortly after the accident, within the *res gestae*. The police officer testified when he got the call, when he got there, and talking to the bus driver.

The Court: Well, as I understand the proposition we are up against here, as a witness to the events, he can testify,

Officer B. W. Hughes.

but he cannot make any statement that constitutes an admission with regard to fault until it is shown that the agent is agent of that variety and class who has authority to make statements. I assume from what has been said thus far, Iddings has the authority to drive the bus, but it doesn't show he has any authority to make admissions as to the liability. I think the idea of events that occurred, why, he, of course, is a witness, but what he says to somebody else is still
page 44 } another thing. It may be an appropriate case of impeachment, but I can't see where it comes in in this case. The ground work isn't laid for the *res gestae* yet.

Mr. Ferrell: For the record, I would like to say my authority is *Virginia Transit Company against Herbert L. Brickhouse, Administrator*, 200 Va., 844, Syllabus 2 and 3.

The Court: You can ask him the question so it will be in the record.

Mr. Ferrell: I also object to the form of the question. He just asked him in general what he said.

The Court: We have him out of the presence of the jury, so he can ask him anything he wants.

(Officer Hughes was called into Chambers.)

By Mr. Rosner:

Q. State for the record, Officer Hughes, what statement the bus driver, Mr. Iddings, made to you on the scene of the accident?

A. Mr. Iddings stated that he first observed the pedestrian when he was about in the middle of the street running with head down and ran into the side of the bus just in front of the rear wheels, kind of knocked pedestrian forward, and that is
page 45 } when the left leg went under the wheels, "applied brakes when I first saw the boy, did not stop in the bus stop on the southeast side of the intersection; last stops were on the southeast and northeast corners of Monument Avenue."

Q. Did you ask him how fast he was traveling prior to the accident?

A. He stated approximately fifteen.

Q. Fifteen miles an hour?

A. Yes, sir, that was a guess.

Q. He stated that he guessed he was going fifteen miles an hour?

Officer B. W. Hughes.

Mr. Ferrell: I object to leading him, even off the record.

Mr. Rosner: That was made for clarification purposes only. That is all the questions I have to ask at this time, Your Honor. What I would like to do at this time is have the officer leave the stand, put the bus driver on, and then put the officer back on the stand, rather than keep him waiting around here.

Mr. Ferrell: I want to cross examine the officer. I object to that kind of procedure.

The Court: Are there any other questions you want to ask of the officer other than this? Was there any other line of questioning?

Mr. Rosner: I have some notes I will have to page 46 } refer to. I just have one other question to ask him,

Your Honor. I want to ask him if he could tell from any of the facts where the child first came in contact with the bus.

Mr. Ferrell: And I am going to object to that.

The Court: You go ahead and ask him; objection sustained.

Mr. Rosner: Then I will ask him if there were any marks—well, then I am going to ask him to put on the plat the marks that he testified to.

Mr. Ferrell: And I am going to object to that unless he qualifies to put all these things on, using the scale and so on and so forth. Incidentally, I will say I have a plat that I have the information put on that has been done, which I will ask him to verify and then tie up later, but as to his going out there and fiddling around with that, with the scale and all, I don't think it is right. It is unfair to the witness and it is unfair to the trial of the case.

The Court: Let me ask the witness, these skid marks that you have been testifying to before the jury out there, would you have any confusion or difficulty in using page 47 } the map drawn to scale with a scale ruler in drawing those on the map or are you familiar with that process?

The Witness: I don't think I would. However, that would be a problem that would confront me after I got there.

The Court: Have you done that sort of thing before?

The Witness: Very little of it.

Mr. Rosner: I am also going to have to clarify the location of the marks in relation to the intersection. I haven't done that yet.

Officer B. W. Hughes.

The Court: It may not be necessary for him to draw them if you do that.

Mr. Ferrell: This is what I am going to show later. I might as well show it to you now, which Mr. Fleet put on.

(Discussion off the record.)

The Court: It occur to me it won't put the officer in any embarrassment about putting it on the plat out there. I think you all can put it on there at some recess, really, with the scale and no question about any confusion, rather than have him draw it out there. Are you going to question him about these things?

page 48 } Mr. Ferrell: Yes, sir, I summoned him as a witness. I thought that was the clearest way of showing it, so I had him to tell Mr. Fleet and Mr. Fleet put it on the map.

The Court: You are going to question the officer about this plat?

Mr. Ferrell: He has looked at it now and I will ask him if his measurements are correct.

The Witness: Yes, sir, all these measurements were made according to my notes and both of the attorneys have copies of my notes.

The Court: I don't want to keep having the officer come back, but what I would like to be able to do is have the officer questioned on this chart here while he is here.

Mr. Ferrell: I have another picture; he has got another picture, too.

The Court: And I will ask counsel for the Defendant if he will be willing for counsel for the Plaintiff to question Officer Hughes on direct examination on this plat?

Mr. Ferrell: Or redirect, after I cross examine.

The Court: Instead of having the officer at-
page 49 } tempt to draw pictures on the plat out there.

Mr. Ferrell: That will take a lot of time and it is difficult to measure those things and be right.

Mr. Rosner: How about me just asking him the questions of the physical facts, going over them again. There will be some repetition, then ask him if he has gone over this with an engineer and put it on a plat.

The Court: I don't think he has gone over it with an engineer. I think Mr. Ferrell has taken the officer's prospective evidence.

Officer B. W. Hughes.

Mr. Ferrell: He discussed it in the engineer's presence and the engineer put it on accurately, but I can handle that.

The Court: That is the thing that is a little embarrassing to me. I think the best thing to do is let Mr. Ferrell put this in his examination of the officer and then if there is anything not clarified, then on your redirect, you can.

Mr. Rosner: That is agreeable. Now, we have got this point. I don't want the officer to stay around all day. I want to put Mr. Iddings on and put the officer on to get back to the question that the Court has ruled on.

page 50 } The Court: You have finished with it other than that, in view of this plat business?

Mr. Rosner: Yes, sir, and depending on the testimony of the bus driver, it may not be necessary for the officer to come back.

The Court: I think what I am going to do at this stage is let the officer be cross examined by the Defendant and whatever other evidence the Defendant wants to use him for, and then any further rebuttal to that and then recess for lunch and I was going to ask the officer to check with us tomorrow morning as to whether he is going to be needed over here tomorrow morning, so we will wind up with the officer today.

Note: The following occurred in open court:

The Court: Are there any other questions of the officer at this time by the Plaintiff?

Mr. Rosner: Not at this time, Your Honor.

CROSS EXAMINATION.

By Mr. Ferrell:

Q. Mr. Hughes, what is the speed limit at this intersection?

page 51 } A. Twenty-five miles per hour.

Q. Did you examine the front of this bus that you have just described a moment ago?

A. You say did I examine it?

Q. Yes, sir.

A. Yes, sir.

Q. Did you do a thorough job?

A. Yes, sir.

Q. Did you find any signs of impact with the pedestrian on the front of the bus?

Officer B. W. Hughes.

A. No, sir, I could not find any evidence—

Mr. Rosner: I object to the form of the question, Your Honor.

The Court: It calls for a conclusion. Objection sustained.

By Mr. Ferrell:

Q. Would you state, please, sir, was the front of the bus—did you consider that the front of the bus had any part in this accident?

Mr. Rosner: I object to that.

The Court: Objection sustained.

By Mr. Ferrell:

Q. You examined the front of the bus very carefully?

A. Yes, sir.

page 52 } The Court: Your examination of the front of the bus, did it throw any light on this?

A. No, sir.

The Court: All right.

By Mr. Ferrell:

Q. Now, you said the bus had pulled over toward the east curb? Approximately how far—

Mr. Rosner: He didn't say that the bus pulled over; he wasn't there.

By Mr. Ferrell:

Q. When you arrived at the scene, the bus was over towards the east curb of the street, didn't you say that on direct?

A. Yes, sir.

Q. Approximately how far was the right front corner of the bus to the east curb of Lafayette Street?

A. I would say approximately a foot from the east curb.

Q. Did you see any golf ball in the area?

A. Any what?

Q. Golf ball.

A. No, sir, I did not.

Q. Mr. Hughes, did you discuss with Mr. Charles Fleet and

Officer B. W. Hughes.

me the physical facts as you found them in the
page 53 } street and go over the location of them with re-
lation to the curb and gutter and so forth on a
plat similar to this? (Indicating)

A. Yes, sir.

Q. Now, I show you this plat marked "A map of the inter-
section of Lafayette Street and Cutshaw Avenue, Richmond,
Virginia, dated October 10, 1960, scale one inch equals twenty
feet, by Charles H. Fleet and Associates, Civil Engineers and
Surveyors," and ask you have you examined this plat now
to see what is superimposed on it as to the distances, for
example, from the north curb line of Cutshaw to the first spot
of blood as indicating twenty-five feet north?

A. Yes, sir.

Q. Is that correct?

A. Yes, sir.

The Court: Wait a minute. You want him now to demon-
strate to the jury.

Mr. Ferrell: I was going to take him through it myself
by questions and answers.

The Court: You don't want him to go over it without the
jury seeing what he is pointing to.

(The said map was marked and filed as Defendant's Ex-
hibit No. 1.)

(The witness stood before the jury.)

page 54 } By Mr. Ferrell:

Q. The distance from the north curb line of Cut-
shaw to the first spot of blood, as shown on this plat, is a
distance of 25 feet, is that correct?

A. Yes, sir, which is from this point to this point right
here. (Indicating)

The Court: Will you take the red pencil and mark with
little red spots the spot of blood?

A. Yes, sir. This little red dot I put partially over the
black was the first evidence of blood found in the pavement.

By Mr. Ferrell:

Q. And that point was how far from the east curb of La-
fayette?

Officer B. W. Hughes.

A. That point is 15 feet from this blood spot over to the east curb of Lafayette Street.

Q. Now, between this spot of blood and the beginning of a skid mark in which there is some flesh, what was the distance there?

A. Twelve feet, which is indicated from this spot to right here.

Q. And that skid mark was, I believe you testified, was 10 feet in length?

A. Yes, sir.

page 55 } Q. And that is shown on here?

A. That is where the flesh and blood was on the pavement.

The Court: Will you lend me the plat and red pencil just a second?

(The Court marked the plat.)

By Mr. Ferrell:

Q. Now, Mr. Hughes, not shown on here are some additional skid marks that you have just described previously on your direct examination, between the end of what is shown here as the wheels on the bus?

A. Yes, sir.

Q. As a matter of fact, there are two skid marks? You said the inside of the duals as well as the outside that laid down the skid marks, outside a short interval of the two?

A. Six inches between the break of this skid mark which was left by the outside dual and the two duals together.

Q. You didn't actually measure that, though, that break that you just described as approximately six inches? That is your estimate?

A. Yes, sir.

Q. Now, Mr. Hughes, from the first spot of blood to the front of the bus was how many feet by your measurements?

page 56 } A. Fifty-seven feet, from the first evidence of blood found on the pavement to the front bumper of the bus.

Q. Now, there is another spot of blood. In fact, it is marked on here "Circular spot of blood." Is that the way you described it?

A. Yes, sir.

Q. And isn't that shown in one of these pictures?

A. Yes, sir.

Officer B. W. Hughes.

Q. Is that the circular spot that appears on Plaintiff's Exhibit No. 3 next to this case?

A. Incidentally, this is the camera box indicating this was a police picture. The camera box was sitting beside the dark spot which was blood left in the pavement.

Q. And that is shown on here, on this Defendant's Exhibit No. 1, as a circular spot, right?

A. Yes, sir.

Q. Now, you measured that circular spot from the first blood spot, did you not?

A. Yes, sir.

Q. And it is 25 feet, correct?

A. Yes, sir.

Q. Now, you also measured from the little blood spot here to the hub of the left wheel, did you not?

A. Yes, sir.

Q. And that was 31 feet, ten inches, as shown on page 57 } here with a broken line?

A. Yes, sir.

The Court: To the rear?

A. In the center of the left rear hub on the bus.

By Mr. Ferrell:

Q. And you previously described in your testimony, but I don't believe I mentioned it on cross, that from the center of this skid mark where it had soft flesh in it, 14 feet to the east curb?

A. That is correct.

Q. And this distance right here from the corner to the curb, I believe you testified is—

A. I estimated, I didn't have a measurement on it, but the bus when I arrived on the scene was pulled into an angle somewhat similar to the one shown on the diagram, facing north on Lafayette.

Mr. Ferrell: I might say that on this sheet is the length of the bus that the officer did, 34 feet, 7 inches, and width of eight feet.

Mr. Rosner: We can stipulate that.

Mr. Ferrell: We can stipulate it.

Officer B. W. Hughes.

By Mr. Ferrell:

Q. Did I ask you about how far was this circular spot from the rear end of the bus, the left rear end?
page 58 } A. I don't have that measurement.

Mr. Ferrell: I can show that. If Your Honor please, we offer this in evidence.

The Court: It has been marked Defendant's Exhibit No. 1.

By Mr. Ferrell:

Q. Did I understand that you got the call at 4:33?

A. Yes, sir.

Q. And you got there approximately five minutes later?

A. I estimated it. I had to drive from Wickham and Chamberlayne Avenue.

Q. I show you two more pictures, Mr. Hughes, and ask you—

The Court: Mark the first one number two.

Mr. Ferrell: I will put the long shot as Defendant's Exhibit No. 2 and the short shot as Defendant's Exhibit No. 3.

(The said photographs were marked and filed as Defendant's Exhibits No. 2 and No. 3.)

By Mr. Ferrell:

Q. Did you take those at the scene, sir?

A. Yes, sir.

Q. And they show the skid marks and the circular spot?
page 59 }

A. Yes, sir, both of them.

Q. You did not take any picture of what you call the first spot of blood?

A. No, sir.

Q. The fact of the matter is it was sort of a fleck of blood?

A. That is correct.

Q. It was very difficult to pick up in a picture or for a person to see?

Mr. Rosner: Your Honor, I object to that.

The Court: Leading.

Mr. Ferrell: I am on cross examination, too. He mentioned the first spot of blood in his direct.

Officer B. W. Hughes.

The Court: I believe that is right, I believe he did. On direct, didn't he examine where the first spot was? I think he did.

By Mr. Ferrell:

Q. Isn't that correct, sir?

A. Yes, sir.

Mr. Rosner: All right.

By Mr. Ferrell:

Q. So, it is fair to say it was just a fleck?

The Court: Describe a fleck. What do you page 60 } mean by a fleck?

A. What appeared to me more or less like a drop of blood like falling off of a bleeding finger.

By Mr. Ferrell:

Q. And you were in charge of the investigation of this accident?

A. Yes, sir.

Q. And did so?

A. Yes, sir.

Q. Well, I will just ask you a general question. Is there anything else, as far as you know from your investigation, as to the physical facts that have not been covered?

A. No, sir. I have the width of the street.

Q. Please state that.

A. The width of Lafayette Street was 40 feet, 2 in. and all of these measurements that I have given the Court were measured by tape and were as near accurate as possible.

Mr. Ferrell: Thank you very much, Officer Hughes.

RE-DIRECT EXAMINATION.

By Mr. Rosner:

Q. Just a few other questions. On this plat that has the measurement of the marks, I just want to clarify one point.

In addition to the spot of blood that we have here, page 61 } 25 feet from the corner and 15 feet from the curb?

A. Yes, sir.

Officer B. W. Hughes.

Q. Then there is a space of 12 feet, then we have 10 feet of flesh and blood mark?

A. Yes, sir.

Q. And then we have about a six inch gap and we have approximately two feet of wider flesh and blood marks which show up on the pictures but are not on this plat, is that correct?

A. Those double skid marks, there is no indication of flesh and blood on those.

Q. And those are not demonstrated on the plat?

A. No, sir.

Q. Could you take any one of those pictures that would show the double skid marks and point them out to the jury so we will know all the markings that were on the scene?

A. That is the double mark so indicated in the picture.

The Court: That is Plaintiff's Exhibit No. 4.

Mr. Ferrell: You have one that is a little closer and clearer, Mr. Hughes.

The Court: Plaintiff's Exhibit No. 3.

A. This picture is a little clearer and the dual marks there in this picture did not indicate any flesh or
page 62 } blood on either marking of the wheel.

By Mr. Rosner:

Q. Those dual marks do not appear on this plat at all but they were there?

A. That is right.

Mr. Ferrell: So stipulated.

By Mr. Rosner:

Q. Now, one other thing, pick up the picture that shows the circular spot of blood, the large area of blood.

A. Both of them have it. Which one do you wish to use?

Q. This one looks a little clearer.

A. This is Exhibit No. 3.

Q. This is Plaintiff's Exhibit No. 3. From looking at the picture and the angle that that picture was taken, it is hard to determine, Officer, whether this spot of blood is this side of the rear or that side of the rear; however, on the plat it shows that the circular spot of blood was further up, so to speak. Do you recall, is this a distortion on the picture or what? You

Lucy Boettcher.

see the spot of blood here is before you get to the end of the bus, but on the picture, from the angle, the bus is at an angle, you can't tell the location. Do you have a recollection?

A. I honestly don't recall.

page 63 } Q. However, the measurements that you took are accurately described in this plat?

A. Yes, sir.

Q. So that, apparently, there is a distortion in the picture, is that correct?

A. I understand photography is a tricky thing.

Q. I just want the jury to know where this spot of blood was and as far as we are concerned, apparently there is a distortion in the picture from the angle and all, but the spot of blood, it would have been up this way more. (Indicating)

The Court: The chart is the accurate thing.

Mr. Rosner: Right.

The Witness: Yes, sir.

The Court: That is all that needs to be asked him.

Mr. Rosner: That is all the questions I have.

Mr. Ferrell: I have no further questions of Mr. Hughes at this time.

(The witness was excused, subject to recall.)

* * * * *

page 64 }

* * * * *

LUCY BOETTCHER,

being first duly sworn in behalf of the Plaintiff, testified as follows:

DIRECT EXAMINATION.

By Mr. Rosner:

Q. Please tell us your name.

A. Lucy Boettcher.

Q. Have you ever been in court before?

A. No.

Q. How old are you?

A. Eighteen.

Q. Where do you live?

Lucy Boettcher.

A. 6402 Stuart Avenue.

Q. Do you remember the accident that took place on Lafayette Street near Cutshaw Avenue on June 7, 1960?

A. I don't remember everything, it's been a long time. I remember some.

Q. Where were you just before the accident occurred?

A. I was waiting for the bus on Lafayette.

Q. Could you look over at this map over here and can you pick out, from looking at that map, where you
page 65 } were standing?

(The witness indicated on the map.)

Q. Is there a bus stop where you were standing?

A. Yes.

Q. I would like for you to take a pencil and put your initials where you remember that you were standing.

(The witness marked the map as requested.)

Q. Now, who was with you, Lucy?

A. Betty Richardson and Mary Lee Chalkley.

Q. Betty Richardson is here today, also?

A. Yes.

Q. But Mary Lee has the measles, she is not here. Tell us, did you see the little boy who was hurt in the accident before he was hurt?

A. Yes, sir, he was playing over here. (Indicating)

Q. Who was he with?

A. Another little boy, but I don't know his name.

Q. Tell us what he did from the time you first saw him. What did he do?

A. He ran across the street and when he was running across the street he dropped the ball and he got across the street and he waited. We told him to wait, there were a couple of cars that went by.

Q. How long did he wait? How long did it take
page 66 } for the cars to go by?

A. They went by instantly. He ran out right after the cars.

Q. What part of the bus did he come in contact with?

A. He ran right behind the front wheel.

Q. Did you look at the little boy after the accident?

A. Yes, sir, I saw him.

Lucy Boettcher.

Q. Generally, just what did he look like? What was his condition after the accident?

A. He didn't cry at all. I didn't remember hearing him cry at all. All I remember was that he was in the street. Someone covered him with a piece of paper thing.

Q. Now, at the time that you saw the accident, did you make any noise or did you hear any noise?

A. Well, I screamed as he ran into the bus.

Q. Now, did the bus stop?

A. The bus curved, he went towards the curb. Evidently, he put on brakes. I can't hear—I don't know when he put on brakes, I can't hear when you slam on brakes.

Q. When did you see the bus start to stop? Was it before you screamed, after you screamed, or when you screamed?

A. When I screamed, he started curving towards the sidewalk.

Mr. Rosner: All right, answer Mr. Ferrell.

page 67 } CROSS EXAMINATION.

By Mr. Ferrell:

Q. Lucy, you were standing on the northwest corner of Lafayette and Cutshaw and with you was Betty Richardson and Mary Lee Chalkley?

A. Yes, sir.

Q. Where was Betty Lou standing?

A. Both of them were standing next to me.

Q. Now, let's say that Lafayette Street runs north and south; was there anyone standing south of you?

A. I don't remember exactly what position we were standing, we were just standing around talking, waiting for the bus.

Q. When the little boy ran across the street, was he south of you or north of you?

A. He was on the other side of the tree.

Q. Would you go over there and mark with an "X" mark where he went?

(The witness marked the map as requested.)

Q. There is a power pole there, isn't it?

A. Yes.

Q. Was he on the north side of the power pole?

Lucy Boettcher.

A. I remember him being there on this side of the telephone pole.

page 68 } Q. He was standing in the bus stop with you?

A. He was standing right there. (Indicating)

Q. And he stood there when the ball was knocked by one of the passing automobile, didn't he?

A. Yes.

Q. When he started out across the street, was there a southbound bus coming in there?

A. Yes, there was a bus coming in this way and a bus coming in that way. (Indicating map.)

Q. Tell us about the southbound bus. What did it do when the little boy started across the street?

A. Well, it stopped, but I don't know how far.

Q. Well, was it at the alley back there? You see that alley?

A. I don't remember because all I saw—I just glanced and saw the bus coming.

Q. You glanced and saw the bus? You mean the southbound bus coming? Did that bus stop?

A. Yes, it stopped.

Q. Did it stop before it came up to where you were standing in the bus stop?

A. Yes, it did.

Q. When the boy started in the street, did he run directly across, start directly across, or did he run at an angle?

page 69 } A. He ran at an angle.

Q. Now, would you draw a line from the place where you made that "X" mark where he stood and give us approximately the angle as he started across the street?

(The witness marked the map as requested.)

Q. Now, did you tell the boy to stay on the side of the street there before he went across?

A. Yes, we told him because some cars were coming and we told him to wait.

Q. Which way were those cars coming?

A. They were going that way. (Indicating map.)

Q. They were going south?

A. Yes, sir.

Q. How many were there?

A. I remember two.

Lucy Boettcher.

Q. You remember two cars? Well, what happened to the ball?

A. One of the cars hit the ball and it rolled over this way. (Indicating)

Q. Rolled over this way? Well, we will have to give the direction.

A. This side of the street. (Indicating map.)

Q. It went over towards the east curbing?

page 70 } A. Yes, sir.

Q. Directly across from you?

A. Yes.

Q. Now, when the last southbound car went by, what did the little boy do?

A. He ran out in the street.

Q. Did he run out directly behind that car, the southbound automobile?

A. Yes, sir, he ran right away.

Q. And you looked up to see where he was running at that time, didn't you?

A. Yes.

Q. What did you see in front of you?

A. Well, when I looked up I saw the bus and he ran into it.

Q. I hand you a picture of Bus No. 546 which has previously been shown to be the bus involved in the accident in this case by one of the exhibits put in by the police officer and, first, before I ask you a question, let me have it introduced and marked Defendant's Exhibit No. 4.

(The said photograph was marked and filed as Defendant's Exhibit No. 4.)

Q. I want you to look at that bus and put an "X" mark approximately the place on the bus that the boy came
page 71 } in contact with it.

(The witness marked the photograph.)

Q. Would you write your name?

(The witness did as requested.)

The Court: It may be passed to the jury.

Lucy Boettcher.

By Mr. Ferrell:

Q. Now, when the little boy ran into the side of the bus as you have indicated, what, if anything, did the bus do?

A. It started swerving to the right, to the curb.

Q. It was swerving to the right?

A. Yes.

Q. Did it come to a standstill?

A. Yes.

Q. Approximately how far did it go before it came to a standstill?

A. I cannot estimate.

Q. Well, what happened to the little boy?

A. The front wheel threw him—when he hit the bus, threw him back to the last wheel. The last wheel dragged over his leg.

Q. Did you see the back wheel dragging his leg?

A. Yes.

Q. How far did the bus move while that was page 72 } taking place, approximately?

A. From the point where the bus started dragging him?

Q. Yes.

A. I am not sure. I'd say about five feet; I am not sure.

Q. Now, did the boy get off the ground at any time after that?

A. I don't know. He might have stood up and then fell down. He was in the middle of the street when they covered him up, so he either rolled over or stood up and fell back in the middle of the street.

Q. Now, what grade are you in in high school?

A. I am a senior.

Q. And you were born on December 11, 1943, right?

A. Yes, sir.

Mr. Ferrell: I have no further questions of this young lady. I do have one question.

Q. When you first saw the boy he was in this yard near the sidewalk that is leading into this apartment house that is shown on here, over in here? (Indicating map)

A. Yes.

Q. You would say right around the shrubs, there, right in this area?

page 73 } A. I think he was playing around here. (Indicating)

Betty Richardson.

Q. You saw him just before he came across the street?

A. Yes, sir.

Q. You hadn't seen him before that time?

A. No.

Mr. Ferrell: That is all.

Mr. Rosner: That is all.

(Witness excused.)

BETTY RICHARDSON,

being first duly sworn in behalf of the Plaintiff, testified as follows:

DIRECT EXAMINATION.

By Mr. Rosner:

Q. Please tell us your name.

A. Betty Richardson.

Q. How old are you, Betty?

A. Seventeen.

Q. Where do you live?

A. 4716 Augusta Avenue.

Q. Where do you go to school?

A. Thomas Jefferson.

Q. And what year are you in now?

page 74 } A. I'm a senior.

Q. You remember the accident that occurred on Lafayette Street near Cutshaw Avenue on June 7, 1960?

A. Yes, sir.

Q. Where were you coming from at the time of the accident?

A. It was after school and I don't exactly remember where we had been just before the accident.

Q. Were you going home from school?

A. I was going over to Mary Lee Chalkley's house.

Q. Did the three of you all go together, you and Mary Lee and Miss Boettcher?

A. Mary Lee and I were going to Mary Lee's house and Lucy was going home.

Q. How far is the school from where the accident happened?

A. About a block.

Q. Now where were you standing just before the accident?

Betty Richardson.

A. On the northwest corner of Cutshaw and Libbie.

Q. Now you can look at this map over here and see if you can get your bearings on that. Could you walk over to the map and point out to where you were standing?

A. I was standing approximately right here. (In-page 75 } dicating map.)

The Court: Did you say Libbie?

The Witness: I meant Lafayette.

Mr. Ferrell: Let her mark that, please, where she put her finger.

By Mr. Rosner:

Q. Put your initials where you were.

(The witness marked the map as requested.)

Q. Now put a circle where Mary Lee was standing.

A. She was between Lucy and I.

Q. Now did you see the little boy before the accident happened?

A. Yes, sir.

Q. Where was he when you first saw him?

A. He was in the yard on the opposite corner playing with—

Q. Was he with anyone else?

A. Yes, he was with someone else. I don't remember how many there were.

Q. Were there any other children in that area?

A. Children that he was playing with, that is the only ones I saw.

Q. Were they making any noises? Did you hear them before?

page 76 } A. I don't remember, I might have.

Q. Tell us what happened. Where did the little boy who got hurt—what did he do? He was on the other side of the street playing, what did he do?

Mr. Ferrell: She hasn't said he was on the other side of the street. She said he was in the yard in front of that house.

The Court: She said on the other side of the street.

Mr. Ferrell: Yes, in the yard, not in the sidewalk.

Betty Richardson.

By Mr. Rosner :

Q. Tell what he did from the time you first saw him until the accident happened.

A. He ran over to our side of the street, to the other side of the street, to our side.

Q. Your side of the street?

A. Where we were, and he had several sticks and a small white golf ball in his hands and he dropped the ball on his way over to our side.

Q. And then what happened?

A. He stepped up onto the curbing and Lucy Boettcher called it to his attention that he had dropped the ball.

Q. Then what did he do?

page 77 } A. He started to go out into the street and we told him to stop because some cars were coming by.

Q. Did he get out a little bit before you told him to stop?

A. He didn't get into the street.

Q. And one of the cars hit the ball and they kept on going and then he went out into the street right after they had passed? How long did it take for him to—after running across to your side how long did it take before he came back out into the street?

A. I don't believe I can determine that.

Q. Then what happened after he went out into the street?

A. The Lafayette bus that we were waiting for came down the street and he ran right out in front of it and I thought it was going to hit him but it didn't.

Q. He stopped?

A. He hesitated for a minute.

Q. I am talking about the bus.

A. Yes, the bus stopped.

Q. Who hesitated?

A. The boy hesitated.

Q. Was he in the street when he hesitated?

page 78 } A. Yes, sir, and then he continued to go towards the ball, and the Broad Street bus, which was going north, was right there in front of him and he ran right into the side of it, approximately the front wheel, and it threw him up.

Q. Did he actually go up into the air?

A. Yes.

Q. What made him go up into the air?

A. I can't say that.

Betty Richardson.

The Court: If you know.

By Mr. Rosner:

Q. If you know.

A. It seems to me that the wheel threw him up.

Q. That is the front wheel? And then when he came down, what happened?

A. When he came down the back wheel, which was skidding at the time, caught him by left leg and dragged him and then ran over his leg and finally stopped.

Q. Did anybody scream at the time of the accident?

A. Yes, sir, Lucy did.

Q. Did you?

A. No, sir, I was too scared.

Q. At what point did the bus—did the bus slow down before the child ran into the front wheel or did it slow down after, or when did the bus slow down?

A. Well, seems like simultaneous with his run-
page 79 } ning into the bus. The bus started skidding like he
put the brakes on and the bus turned over to the
east, towards the east side of the street.

Mr. Rosner: Thank you. Answer Mr. Ferrell.

CROSS EXAMINATION.

By Mr. Ferrell:

Q. They call you Betty Lou?

A. Just Betty.

Q. Betty, you are a senior at T. J. now?

A. Yes, sir.

Q. And this was about 4:30 in the afternoon of June 7th?

A. Yes, sir.

Q. Now when the boy ran out into the street how far away was that southbound bus that you thought might hit him? How far away was that from him, approximately?

A. Well, when he was clear of the bus, the bus had stopped; it seemed to be from about four to eight feet, I'm not sure.

Q. In other words, the bus came to a stop, the southbound bus?

A. Yes.

Q. And the boy was about four to eight feet in
page 80 } front of it?

A. Yes, when it stopped.

Betty Richardson.

Q. Well, now, did that bus stop suddenly?

A. Yes, it appeared to.

Q. Did you hear the brakes skid or the tires skid on the pavement, gravel?

A. I don't remember any skid.

Q. But you watched the boy as he ran?

A. Yes.

Q. And how did he hold his head? Was he looking where he was going, is what I am trying to find out.

A. Well, his head was lowered.

Q. His head was lowered?

A. In the direction of the ball.

Q. Now, in which general direction was he going? Was it straight across the street or was it *an* an angle across Lafayette Street?

A. It was in a northeast angle.

Q. And you say he started off from the curb right after the southbound automobile had gone by, right behind it?

A. Yes.

Q. And right in front of the southbound bus?

A. Yes.

Q. And then you looked up, I suppose, and
page 81 } watched him the way he was running?

A. Yes.

Q. And what struck your eye between you and the other side of the street?

A. Well, the bus was—I noticed the bus.

Q. The northbound bus?

A. Yes, when he started running.

Q. As you looked across the street, you looked into the side of the northbound bus, didn't you?

A. Yes.

Mr. Ferrell: Here is another picture of the same bus. Let me have that introduced as Defendant's Exhibit No. 5.

(The said photograph was marked and filed as Defendant's Exhibit No. 5.)

By Mr. Ferrell:

Q. Looking at that picture, as you looked yourself, as you looked directly across the street, what portion of that bus would be in your direct line of vision, at right angle, looking across the street?

Betty Richardson.

Mr. Rosner: I don't understand the question.

By Mr. Ferrell:

Q. Do you understand my question? I am trying to find out what portion or what point in the bus was displayed page 82 } rectly opposite you.

Mr. Rosner: When?

By Mr. Ferrell:

Q. At the moment that you looked up and saw the little boy running out into the street.

The Court: Let's get it straight this way. You previously testified that across the street from you you saw a bus. Now, I want to know two things, namely, what part of the bus was it you saw and at that moment where was the little boy?

A. I saw the front portion, about the front half portion of the bus. I didn't look exactly at it because I was actually watching the boy.

The Court: Where was he at that split second? You can look at the map on the board over here. How far into the street had he gone or gotten?

A. He was in the middle of the street.

The Court: All right.

By Mr. Ferrell:

Q. Now, would you mark where, approximately, on the side of that bus the little boy collided with it, on the picture?

The Court: Put your initials.

(The witness marked the photograph.)

page 83 } By Mr. Ferrell:

Q. Now as you watched the boy as he ran, did he ever hold his head up before colliding with the bus?

A. Not that I know of.

Q. Did he ever slacken his pace?

A. I don't believe so.

Betty Richardson.

Q. Was he running fast or slow? Can you describe how it was?

A. It was a moderate pace of running, it wasn't actually fast but then it wasn't slow. It is hard to describe.

Q. Now from the time that the little boy came in contact with the bus and when the bus came to a standstill, approximately how far did the bus move northwardly down the street?

A. Approximately twenty-five feet, I'd say.

Q. Now after the left back wheel caught the little boy's leg, how far did the bus move, if you know, approximately?

A. Approximately ten feet.

Q. Now could you tell whether or not the brakes were on or the wheels had stopped before the back wheel came in contact with the boy's leg?

A. Well, it was skidding when it came in contact
page 84 } with his leg.

Q. The left back wheel was skidding when it came in contact?

A. Yes.

Q. I don't think I asked you where the little boy was standing on the side of the street next to you and your two girl friends, did I?

By the Court:

Q. How far was he standing from you all and which way up or down the street?

A. He was north of us.

Q. North of you?

A. Yes, sir.

Q. How far would you say in feet, or point out something in the courtroom, if you want.

By Mr. Ferrell:

Q. Let me put it this way. Do you recall the electric pole there?

A. He was on the other side of the pole.

Q. Was he right at the pole, close to it?

A. No, he was several feet away from it, north of it.

Q. What about the tree? The tree and the pole were between you and the boy, is that right?

page 85 } A. Yes, sir.

Q. How large a girl is your friend Mary Lee Chalkley?

A. Well—

Betty Richardson.

The Court: That is an ambiguous question. Are you referring to height?

Mr. Ferrell: No, I am talking about weight just in general.

A. Well, at that time she was rather plump.

By Mr. Ferrell:

Q. She was rather plump? All right, thank you. Did you see where the ball went to?

A. It went over into the gutter.

Q. Over on the east side?

A. Yes, rolled over in that direction.

Mr. Ferrell: I think that is all.

RE-DIRECT EXAMINATION.

By Mr. Rosner:

Q. Did this whole thing happen real quick, all of a sudden?

Mr. Ferrell: I will have to object to that.

The Court: Within what time limit?

Mr. Ferrell: She said she couldn't say.

page 86 } By Mr. Rosner:

Q. How long did the whole occurrence take from the time he started out across the street towards you until the time the bus hit him? Approximately how long did that whole sequence of events take?

Mr. Ferrell: I object, she's already said she couldn't estimate how long he was in the bus stop with them on the north-west corner and I submit if she can't estimate that, she can't put the middle against the end and give an estimate on the other.

Mr. Rosner: Your Honor, before the Court rules may I ask her if she can give an answer to it, before she gives the answer?

The Court: Without stating, can you give a fair estimate from the time you saw the boy leave the curb over on the other side of the street and run to where you all were and then go back across the street and the the accident happened? Do you have any idea?

The Witness: No, I don't recall any definite time.

Louis Ralph Schain.

Mr. Rosner: That is all.

Mr. Ferrell: I have no further questions.

(Witness excused.)

page 87 } LOUIS RALPH SCHAIN,
the plaintiff, being first duly sworn testified as
follows:

DIRECT EXAMINATION.

By Mr. Rosner:

Q. What is your name, Louis?

A. Louis.

Q. How old are you?

A. Eight.

Q. Louis, you know what it means to tell the truth and to tell a lie?

A. Yes.

Q. Are you supposed to tell the truth or are you supposed to tell lies?

A. Truth.

Q. What happens when you don't tell the truth?

A. Well, you go to prison for a few days or a few months.

Mr. Rosner: Talk a little louder.

Mr. Ferrell: Don't you think it would be better for the Court to conduct this?

By the Court:

Q. What did you say happened to you when you told a story?

page 88 } A. Well, I was playing with George—

Q. Wait a minute, I want to know what happens to you when you tell a lie.

A. Well, you go to prison for a month, day, year week.

Q. Are you in the habit of telling the truth?

A. Yes.

Q. Do you get many whippings for not telling the truth?

A. Plenty, sometimes.

The Court: I guess he knows what it is to tell the truth. Go ahead.

Louis Ralph Schain.

By Mr. Rosner :

Q. I will ask the questions and you can answer them like they do on television, now. We can do it the same way. Do you remember how old you were when the accident happened?

A. I was six.

Q. How did you happen to get out of the house?

A. Well, my maid, she went into the bathroom and then I just sneaked out.

Q. Where were your mommy and daddy?

A. At work.

Q. What did you do when you sneaked out?

A. Well, the first idea I had was to play in my
page 89 } back yard and my maid knew about that, she came
out and saw me playing in the back yard and told
me not to go anywhere.

Q. Then what did you do?

A. Then I didn't listen to her and I went over across the street to play with George in the park.

Q. Where is the park on this map? Can you figure it out?

A. Right there. (Indicating map.)

Q. Now tell us how the accident happened.

A. Well, George and me were playing ball and George threw the ball a little bit too hard and so it went across the street and then I went after the ball and I rolled it back to George. I don't know if he got it or it went into the gutter, and then I started across but I saw the car and the bus coming so I waited for them and then I started across when the other bus hit me.

Q. Now what grade are you in now, Louis?

A. Second.

Q. What sort of grades do you get in school?

A. I have been getting pretty good, okay.

Q. What about on deportment?

A. The usual.

Q. Not so good? Now does the leg that was hurt
page 90 } in the accident feel any different from the other
leg?

A. Just for one thing. Well, when I run—sometimes I used to hop and sometimes I used to skip but now I am starting to, that is, skip better; my running and skipping and honping is improving.

Q. Will your leg always look the way it looks now or will it get better?

Louis Ralph Schain.

A. I know it will get better.

Q. Can you run the way you used to run?

A. Yes.

Q. Can you climb the way you used to climb?

A. Yes.

Q. And you play games with the other children?

A. Yes.

Mr. Rosner: Answer any questions Mr. Ferrell has to ask you.

CROSS EXAMINATION.

By Mr. Ferrell:

Q. Your name is Louis Ralph Schain, isn't it?

A. Yes.

Q. Where did you live, Louis?

A. I lived on Cutshaw Avenue, Apartment 4, 3901.

Q. That is at the other end of the block—

page 91 } A. Yes.

Q. —from where Lafayette and Cutshaw are, and you went out of the house and played in your back yard a little while?

A. Yes.

Q. Did you go up the street and get George or did George find you?

A. I went up and got George.

Q. That is George Turner, isn't it?

A. Yes.

Q. And then you went over there—

A. —to the park.

Q. That area that is near Augusta Avenue that is owned by the Home Beneficial Insurance Company, isn't it?

A. You mean the park?

Q. Yes, where all those little trees are down there. You see the trees, is that where you were playing?

A. We were playing right around here. (Indicating map.) There was a tree over here, it was this tree; we were playing around here.

Q. And was that where George threw the ball too hard?

A. Yes, he threw it towards that way. (Indicating)

Q. And it went across the street?

page 92 } A. Yes.

Q. You are sure you didn't have it in your pocket?

Louis Ralph Schain.

A. No.

Q. But did you have a bow and arrow in your hand?

A. I just had the bow.

Q. And you still kept ahold of the bow—you can sit back down.

A. That's all right, I can stand.

Q. So you went over to get the ball?

(The witness returned to the witness stand.)

Q. And you did get the ball?

A. Yes, and I rolled it back.

Q. You didn't just throw it, you rolled it back?

A. Yes.

Q. Where did the ball go? Did it get to George?

A. It went to the—what do you call it—the curb of the street.

Q. The gutter?

A. No, not to the gutter, to the curb somewhere.

Q. Well, now, you say that before you started back across the street you waited for some automobiles and a bus? Were they going south on Lafayette? Do you know the difference between south and north?

page 93 } A. Yes.

Q. They were close to you?

A. They were going that way. (Indicating map.)

The Court: Were they going towards Broad or coming from Broad?

The Witness: From Broad Street.

The Court: They were coming from Broad Street towards Grace Street?

The Witness: They were coming from that way to this way. (Indicating map.)

The Court: Don't pay any attention to the map. Were they coming from Broad Street towards Grace or from Grace Street towards Broad Street?

The Witness: To Broad Street.

The Court: To Broad or from Broad?

The Witness: To.

By Mr. Ferrell:

Q. You waited for those to go by?

A. Yes.

Q. Did the bus that was going to Broad Street go by?

Louis Ralph Schain.

A. Yes.

Q. And then you started across the street, is page 94 } that right?

A. Yes.

Q. Were you running?

A. Well, I was going normal, I was running, and—

Q. And what?

A. I was running slow; I was running medium, I call it.

Q. Running slow and medium? Did you see a bus as you were running, another bus?

A. That one I didn't see.

Q. The one that hit you you never saw?

A. That one I didn't see until it hit me.

Q. Did you see it when it hit you?

A. Yes, though I wasn't sure—when it hit me I wasn't so sure—when it hit me I didn't even feel it. I must have blacked out for a minute.

Q. But you never saw it before you ran into it?

A. No.

Q. Do you know what part of the bus you ran into?

A. Yes.

Q. What part?

A. Left side behind the wheel.

Q. And then what happened to you, son?

A. Well, the bus stopped and the bus driver came out and the policeman came and the people and I was page 95 } scared, though I wasn't yelling or anything, or crying.

Q. Then the ambulance came and took you to the hospital?

A. Yes.

The Court: Do you remember three girls standing near you when this happened?

The Witness: Yes.

The Court: Just before it happened?

The Witness: Three girls.

By Mr. Ferrell:

Q. Do you recall one of them telling you to stay over there and not to go across the street?

A. I don't know which one said it, they said, "Wait until the bus comes," though I didn't hear that part.

Q. Well, you were told not to cross that street, weren't you?

A. Yes, but I didn't hear it.

George Turner.

Q. You were told by your folks not to cross that street?

Mr. Rosner: I object to that. I don't see where that has anything to do with whether he was or was not.

Mr. Ferrell: I withdraw the question. I have no further questions at this time.
page 96 } Mr. Rosner: I have no further questions.

(The witness stood aside.)

* * * * *

page 104 }

* * * * *

GEORGE TURNER,
being first duly sworn in behalf of the Plaintiff, testified as follows:

DIRECT EXAMINATION.

By Mr. Rosner:

Q. George, how old are you?

A. Eleven.

Q. Where do you go to school, George?

page 105 } A. Robert E. Lee.

Q. How long have you been going there?

A. Do what?

The Court: What grade are you in?

A. Third.

By Mr. Rosner:

Q. Were you with Louis when he got hurt, George? Do you remember much about it?

A. I think so.

Q. Whatever you remember about it, I want you to tell us and what you don't remember, we will understand if you don't remember it. You just tell us what you remember about it.

A. Louis was going across the street—

Mr. Ferrell: I don't think he has quite qualified him yet,

Dr. William P. Spencer.

Your Honor. I think he ought to at least go through the procedure of finding out whether he understands the importance of his oath.

The Court: Do you want him to testify?

Mr. Rosner: I am frankly not too interested in his testifying.

The Court: Do you want him to testify?

Mr. Ferrell: I really do if he is capable of page 106 } testifying.

The Court: I will put it this way. If the Plaintiff wants to qualify him to testify, you may proceed. From the Court's standpoint at the moment, I have some doubt in observing the witness whether he is qualified to testify.

Mr. Ferrell: That is my understanding. Having interviewed this witness, I don't want to hold anything back. If he is qualified to testify, I want him to testify. In other words, I am in the same dilemma.

Mr. Rosner: I wanted to bring him here because he was there and didn't want to be in position of holding anything back. However, I am not interested in the boy testifying.

The Court: You may step aside, and if the Defendant wants to put him on, we will make arrangements.

The Witness: Could I tell you something?

The Court: No, you might spill the beans.

(The witness stood aside.)

* * * * *

page 134 }

* * * * *

DR. WILLIAM P. SPENCER,
being first duly sworn in behalf of the Plaintiff, testified as follows:

DIRECT EXAMINATION.

By Mr. Rosner:

Q. Please state your name.

A. William Price Spencer.

page 135 } Q. What is your occupation?

A. Pediatrician.

Q. How long have you been practicing medicine?

Dr. William P. Spencer.

A. Since 1944.

Q. Could you give us some of your medical background and educational background?

A. Yes, I was graduated from the University of Virginia in 1944 and interned nine months and went in the U. S. Army for two and a half years, came out in 1946, took a year's residency on internal medicine and two years on pediatrics, went into practice here in Richmond in pediatrics in 1950.

Q. Tell us what pediatrics means.

A. Well, pediatrics is the care of the growing child. There are several derivations to the word itself, but it means to grow straight in one particular translation of the Greek.

Q. Had you been Louis' pediatrician before the accident?

A. Yes, I have been Louis' pediatrician since he was born.

Q. Can you tell us whether he had any disabilities before the accident?

A. No, sir, he had no disability. In fact, he was a very healthy child compared to most of my patients.

Q. How often, approximately, did you see him page 136 } before the accident?

A. May I refer to my records?

Q. Yes, sir, and in addition, we have here some hospital records when we get to that that you may also refer to.

A. This is Louis' record from the office, and I saw him, of course, at monthly or six weeks intervals during the first year like I usually do, and four or five months during the second year; I saw him ten times—he was seen ten times because one of these, Dr. Weinstein, who alternates with me, saw him one time—ten times during the first six years outside of regular checkups and shots.

Q. Do you have a record there of his height and weight when he was six years old?

A. Not when he was six years old. The last time I saw him, I believe, was in 1959—August, 1958 when he was five and three-quarters years old, because I believe his birthday ran October 4, or something like that. His height at that time—

Q. Just a minute. I don't know if it would be relevant at that time.

Mr. Ferrell: I will take it.

By Mr. Rosner:

Q. Go ahead.

A. On August 17, 1959, at the age of five and three-quarters

Dr. William P. Spencer.

years or almost six, he weighed fifty pounds and
page 137 } he was forty-six and one-quarter inches tall.

Q. And what date was that?

A. That was August 17, 1959.

Q. Would you assume, from your knowledge of the child, that on June 7, 1960, he was taller and heavier?

A. I would assume so, assuming that he had had no drawbacks during the year and that he continued to grow at the rate he continued to grow since birth.

Q. Being his pediatrician, you knew of no drawbacks?

A. No, sir.

Mr. Ferrell: He didn't see him.

By Mr. Rosner:

Q. You hadn't been called for anything after the time that you measured him—

A. Let's see—

Mr. Ferrell: Get the next time you measured him.

The Court: What is the next measurement you have, what date?

A. That, I believe, sir, is the last measurement I have, in 1959 was the last complete checkup he had because at that time he was coming in at yearly intervals and he should have been back between August and October of 1960 and, of course, the accident intervened.

page 138 } By the Court:

Q. Assuming no disability between this August, 1959 checkup and, what is it, June, 1960, how much would he grow?

A. Well, sir, the yearly increment of a child this age should be somewhere between three and a half and five pounds.

Q. I mean in height How much taller would this boy be?

A. That is going to vary according to families. His heredity is on the short side. He would probably grow somewhere between one and two inches.

By Mr. Rosner:

Q. If you were asked to estimate the height on June 7, 1960, you would say it would be about one or two inches more than the height that you gave?

A. Probably. It is not a full year from that date. Also,

Dr. Bernard D. Packer.

there is another factor, if I may say so, and that is the fact that children grow more in height during the Spring and gain more in weight during the Fall and Winter.

* * * * *

page 160 }

* * * * *

DR. BERNARD D. PACKER,
being first duly sworn in behalf of the Plaintiff, testified as follows:

DIRECT EXAMINATION.

By Mr. Rosner:

Q. Please state your name, sir.

A. Bernard D. Packer.

Q. Are you a duly licensed physician?

A. Yes.

Q. Are you engaged in the medical practice?

A. I am.

Q. Where is your office, Dr. Packer?

page 161 } A. 1001 West Franklin Street.

Q. How many years have you been engaged in the medical profession?

A. Since 1936.

Q. Have you specialized in any particular branch of medicine?

A. Yes, I do bone and joint surgery.

Q. And could you tell us what your training has been in your medical and specialty training?

A. My general medical training was at the Milwaukee County General Hospital for two years, internship, residency, and at Johnson Emergency Hospital as Resident Staff Physician; then to the University of Ohio and took graduate work in bone and joint surgery and left there and was at the Crippled Children's Hospital in Richmond. After completing a year at Crippled Children's Hospital in Richmond, I was called in Military Service where I served five years doing the same work, bone and joint, and after Military Service I established private practice at the present address and continuing the practice of bone and joint surgery in Richmond.

Q. What hospitals are you now connected with?

Dr. Bernard D. Packer.

A. I am connected with Richmond Memorial, Retreat, and Sheltering Arms.

Q. Do you do any teaching?
page 162 } A. Yes, teaching is mainly at Richmond Memorial. I also give anatomy lectures at the Medical School.

Q. Are you a member of any professional medical societies?

A. Yes, the American Medical Association, State of Virginia Medical Society, the State of Virginia Orthopedic Society, and the Southern Medical Association.

Q. Did you see Louis Schain on June 7, 1960?

A. Yes.

Q. Where was he when you first saw him on June 7, 1960?

A. I was called to the emergency room at the Medical College of Virginia.

Q. When you first saw him did you obtain a history of what had happened to him?

A. I obtained a very brief history because it was very obvious what his injuries consisted of at the time, that he was injured, struck or run over or knocked down by a large vehicle. They told me it was a bus.

Q. And I assume that you made an examination at that time?

A. Yes, in the emergency room.

Q. Please tell us what your examination revealed, Doctor, in the emergency room?

page 163 } A. In the emergency room the child seemed to be pale, gray, ashen, and the condition we call shock. He was restless, the left leg was extremely mangled and flesh was torn open, of course. There were fractures at the knee and below the knee and he was getting intravenous glucose for his shock and we started blood transfusion. We packed his wound and splinted his leg and attempted to get him out of his shock condition.

Q. Tell us a little bit about what shock is.

A. The condition called shock is a critical condition that is found usually in serious illnesses or serious injuries in which the blood pressure is very low, dangerously low. The patient may or may not be unconscious, may be restless, may be thrashing, but his pulse and respiration are abnormal and he is in a state of collapse; of course, pain, agonizing pain is a part of shock, and if this condition will go on too long, the patient will die in the state of shock. That is, his heart will eventually stop.

Dr. Bernard D. Packer.

Q. Is there any medical term for the type of injury that this boy had as far as the flesh on his left leg was concerned?

A. Well, actually, in examining the limb it was found that the skin and the muscles and the underlying tissues were just laid bare of the bone, opening up the wound, page 164 } everything opened up like a fillet of a steak, you might say, and the knee joint was exposed. You could look right into the open knee joint on the outside.

Q. Now, what was your treatment at that time? Was anything done by you in the emergency room?

A. The emergency treatment consisted of life saving measures to pack the wound with penicillin soaked gauze sponges, to prevent excessive hemorrhage and oozing, to wrap the limb and support it because it was also fractured. We applied a splint and the patient was getting glucose in the vein. That is sugar and salt solution. He was getting a blood transfusion and he was placed in what we call a shock position in which the head is lower than the foot so the little blood he has can gravitate toward his head. He was kept in warm blankets and given hypodermics for pain.

Q. Where was he taken from the Medical College emergency room?

A. Arrangements were made for the operating room at Richmond Memorial and they were setting up the operating suite in preparation of moving this patient directly to the operating room at Memorial. When his condition improved enough to be transported off of the emergency litter table, we bundled him up carefully and placed him in a private ambulance and transported him to Memorial Hospital page 165 } where he was kept in a shock position, warm bed, in a bed elevated with his head down. He was typed for more blood transfusions and the operating room was prepared to receive him.

Q. Now, when you got him to Richmond Memorial Hospital operating room, tell us what procedures were followed by you at that time.

A. He was given a general anesthetic and he was given the third pint of blood. The anesthetic doctor stated that his condition was critical but we waited as long as we could to get started because it would not improve any more. We took the chance of giving a general anesthetic and because the main artery in his leg was widely exposed and open, it was fear of this main artery clotting and should that happen he, of course, would lose his limb. There was also danger that

Dr. Bernard D. Packer.

when his blood pressure started rising towards normal that all these open, raw areas would start oozing and bleeding over again and we would not be able to control it except in the operating room with equipment we need for controlling hemorrhage, so we went ahead with the operation. I called in Dr. Owen Gwathmey to assist in handling the main vessels on the inside of the leg while I handled the outer side which had the open, exposed knee joint. Between us we did what we call a classical debridement operation, cleaning of all dead, sloughed off tissues, removing, cleaning gravel
page 166 } and dirt out from the knee joint properly, cleaning the bone structures, tying off any bleeding vessels. When that was completed, we explored the main artery on the inside of the leg and that was still functioning all right, it wasn't clotted. So we were able to get enough skin and flesh cover back over about two-thirds of the limb. The rest we couldn't cover with his own skin so we took skin from his normal leg, in the skin graft manner, and stripped it down the middle so we had fairly good coverage of the entire limb. We knew that certain areas of the skin would eventually die and slough off. Drains were placed under the large flaps of skin that extended way up to his waistline. You could get your hand from the leg up to his buttocks, over the hip bone and various drains were placed there because we expected the blood to pool and continue to ooze in those areas and he was put in a half shell cast so we could carefully watch the limb.

At the completion of the operation, he was sent to his room and given *careful* attention from there on.

Q. Doctor, I have some photographs here marked Plaintiff's Exhibits 5, 6, and 7. I show you Plaintiff's Exhibit No. 5 and ask you if this photograph would help you explain the type of dressing that were placed on the child that you have just testified to?

A. Yes, this picture shows the patient after he
page 167 } had been operated on and was apparently in his crib, bed, and the right leg shows a short dressing from the hip to the knee.

The Court: Turn it around so the jury can see what you are talking about.

A. (Continuing) The right leg shows a dressing and that is his normal leg and we took the skin from his normal leg and covered the large area on the inner side of the thigh that we couldn't quite cover. The injured limb is fully wrapped

Dr. Bernard D. Packer.

and encased in dressings and splints so you see nothing but the outer dressings.

Mr. Rosner: I would like to introduce that photograph as Plaintiff's Exhibit No. 5.

(The said photograph was marked and filed as Plaintiff's Exhibit No. 5.)

By Mr. Rosner:

Q. I show you a photograph marked Plaintiff's Exhibit No. 6 and ask you if that photograph also shows the dressings that were applied, that you just testified to?

A. That is the same dressing but from the other side. (Showing photograph to the jury.) It shows the injured leg that is encased in a plaster half-shell splint and a lot of dressings and the whole limb is wrapped with those
page 168 } Ace bandage dressings from his toe to his groin.

Q. I hand you a photograph marked Plaintiff's Exhibit No. 7 and ask you if you can explain that photograph to the jury.

A. This shows the area of skin that was damaged up to his belt line and dressings and drains were in this area (indicating). It was almost up to his belly button. If you look closer, you will see the black area of his skin even above the dressing, extending up to his rib line.

(The said photographs were marked and filed as Plaintiff's Exhibits No. 6 and 7.)

Q. Now, Dr. Packer, you mentioned fractures of the knee, compound fractures of the knee and fracture of the tibia. Could you explain—first of all, what is a compound fracture?

A. A compound fracture is a broken bone in which the broken bone is exposed to the air and the atmosphere and the surrounding conditions of the atmosphere, or if there is dirt and so forth. It means that the bone is broken and any germs that are on the skin or in the atmosphere or on the ground, wherever the patient was, are embedded in the broken piece of tissue. There is bleeding, the bone sticks right out
page 169 } of the skin. This is always much more serious than a simple crack or break in the bone in which the bone remains covered under the skin because germs will produce abscess and infection in the bones.

Q. Doctor, we have a pad on the broad behind you and we

Dr. Bernard D. Packer.

have some grease pencils here, and I ask you, if it would help in explaining the fractures that this child suffered, to sketch on these pads and use any other aid in helping explain the fractures to the jury. Would that be of help to you?

A. Yes.

The Court: Let's have an oral description of them first.

By Mr. Rosner:

Q. Tell us about the fracture of the knee and the fracture of the tibia as best you can.

A. The fracture of the knee occurred on the outer side. His greatest damage was on the outer side of the limb and the knee joint was torn up, you might say, on the outer side because when you stood on the outer side and looked in, you saw the depth and the internal structure of the knee. There was also grit and gravel that was ground into the bony surface that was exposed. The fracture of the shin bone occurred farther down and was not visible except by X-ray because the skin had covered that area and wasn't
page 170 } ripped away from the bone. It was about three
or four inches distal to the knee and both bones
were broken through.

The Court: Was the shin bone compound?

A. No, the shin bone was a closed fracture. The knee joint was compound. Actually, the bony knob of the thigh bone which makes up the knee was grazed across and chipped across, ground in with dirt.

By Mr. Rosner:

Q. Did you say that both of the bones in the leg below the knee were broken?

A. Yes, sir.

Q. Were they broken clean through?

A. They were both broken completely through so that the limb was angulated, bent, and it had to be straightened to a certain extent. Although the main bone, the tibia, was held into place, the skinnier bone was completely rent asunder.

Q. Do you have any X-ray films or negatives that would show what the fractures looked like before anything was done and then afterwards?

A. I have the recent pictures. I don't have the original

Dr. Bernard D. Packer.

pictures because the hospital said they were subpoenaed. I don't know where they are now. Are they here?

Mr. Rosner: No, they didn't get here.

page 171 } A. (Continuing) I went down to look for them and they said they were drawn, but I do have my own which are more recent and they demonstrate very obviously the normal and abnormal limb.

Q. We do not have a view box here, Doctor.

A. If they hold it to the light, I think they will be able to see. These are healing pictures. The child has been walking on his limb. Where these button marks are, that shows which limb, and here is where the limb was fractured. You can still see how it is bent out, the other limb is a normal limb in comparison.

Mr. Ferrell: I think he ought to identify the time these were taken.

A. The date on here is 1/25/61; this is 8/17/61, a late date. They are both the same types of pictures showing both limbs. This is healing a little better (indicating) but the limb is still bent, angulated a little bit.

The Court: Are they coming in as exhibits, Mr. Rosner?

Mr. Rosner: Yes, sir, I would like to.

(The said films were marked and filed as Plaintiff's Exhibits 8 and 9.)

The Court: The earlier one will be No. 8.

page 172 } By Mr. Rosner:

Q. Dr. Packer, we have the medical records here in the event there is any need for you to refer to them. They are available to you. After the initial operation, Doctor, the debridement operation that you testified to, what was his condition after the operation and how did he progress?

A. Well, his condition remained serious as in all these cases, because we are now faced with the complications of these injuries, the dying of various muscles, the development of infections, abscesses, absorption of broken down blood clots, and dead muscle tissue will have to be absorbed because you can't get 100 per cent removed; a little here and

Dr. Bernard D. Packer.

there escapes you. You cannot locate fine, little pieces and there is a period of time in which it is touch and go, if you use the common expression, in which the pulse is rapid, temporarily elevated, the patient is sick and loses weight, he doesn't eat, he vomits. He also had intestinal injuries because he had black, bloodystools for a number of days and we were concerned that the damage to his abdomen may have seriously damaged the intestinal tract, but this quieted down after several days and did not need any further surgery attention.

Q. As far as the internal?

A. Internal injuries, he was oozing internally because he was passing bloody, tarry stools.

page 173 } Q. That particular phase cleared up after several days?

A. Yes.

Q. Did he require nursing care after the accident?

A. He required constant nursing care, twenty-four hours a day, because he was in so much pain constantly and fretful, running fever and high temperature and it was difficult to keep him sedated and quiet, as you can imagine.

Q. What was the next operative procedure performed upon Louis after the initial operation, Doctor?

A. The next procedure was to remove his drains and inspect the wounds and observe for any complications such as gas gangrene which was always our big worry. The drains were eventually removed and he was seeping a lot of black, old blood out of the drain wound, but the cultures came back satisfactory; that is, we didn't have any pus infection or gas infection, and eventually the large amount of seepage and loss of the black, bloody fluid from the limb quieted down. We had eventually removed the stitches and this was quite a chore, if I must use that word advisedly. I don't want to be dramatic, but it involved four nurses plus myself to quiet the patient and to restrain him so we could do anything whatsoever with him in a dressing manner. We could not take him down and give him a full anesthetic every time we
page 174 } had to take stitches out and he had many, many, many stitches. These stitches were removed piecemeal day by day, and certain areas of his skin turned black in spite of everything and had to be trimmed and cut away from the live tissue, as a separator, and this went on for weeks.

Q. What was his temperature during this period of time?

Dr. Bernard D. Packer.

A. His temperature elevated as high as 104 and his pulse raced up as high as 150 for at least a month and a half. Eventually, we were able to—we call this simple procedure in the dressing room debridement of the tissue areas that seemed to die. When these tissue areas die, the skin naturally gapes apart more and more until we find we have a large, big, raw area here and throughout the limb. When we removed all the dead tissue and fresh growing red tissue grew in to take its place, we applied hot dressings and when this cleaned up nicely, then we were able to skin graft. This would be his second skin grafting procedure. The first graft took very nicely but there were large open areas that required secondary skin grafts. For this second we called in Dr. Leroy Smith who is a plastic surgeon and specializes in complicated skin loss cases.

The Court: He has already testified.

A. (Continuing) We decided on the optimum page 175 } time to do the next procedure and we did a combined procedure. Both of us took areas of skin, applied it and sewed it, and so forth.

By Mr. Rosner:

Q. Were dressings applied after this operation?

A. Yes.

Q. And do you recall how long these dressings remained and how often they were changed?

A. These dressings remained on approximately two weeks without being disturbed and then they were removed and small areas of skin did not take. These were little areas but I would say 90 per cent of the skin took immediately, which was very gratifying.

Q. Now, after the skin grafts took, or most of them took, what was next in the line of his treatment?

A. The next procedure was to cover the few small areas with small skin grafts the size of postage stamps and to attempt to straighten his knee and to attempt to straighten his paralyzed foot. The foot was drawn down into this position. (Indicating) There was no way of straightening it. We have attempted through physiotherapy to exercise it, but the limb was paralytic below the knee and we had to resort to the next procedure, which was to lengthen the heel cord

Dr. Bernard D. Packer.

tendons to get his foot in a near normal position
page 176 } and at the same time to straighten the contracted
position of his knee. His knee was in this position (indicating) and at this time we also put the small sections of skin on, the few little areas that didn't take. He was then put in a cast after this procedure, full cast.

Q. You explained that his foot was paralyzed below the knee but you didn't explain how or why it was paralyzed. Could you go into that, please?

A. In addition to the muscle being damaged and many small blood vessels that were damaged, the nerves in back of the knee were also bruised to the extent that the nerve did not live. At the emergency room there was just a very little flicker of motion in his toes and this faded out after several days and it was very obvious that the back of the knee was all torn away, it was a wide open area in the back of the knee, and in attempting to close it, we had to bend the knee down to this point (indicating) to get the skin to close, and when this skin healed over, large areas of this gaped open area sloughed out and they had to be skin grafted so the area where the nerve crosses the bone in back of the knee was definitely damaged and bruised to the extent that the skin died over it.

Q. Now, could you explain what this heel cord lengthening operation was?

page 177 } A. Yes, unless we did something to square his
foot, he would not be able to stand or even to get into a brace. The foot was drawn down into this toe-down position and his knee was fixed and we were unable to get him to stand on this type of a limb. We had to do two things, straighten the knee and we had to square his foot and the thing that could be done was to lengthen the cord in back of his ankle. We lengthened that; that is, the procedure actually is to make an incision, a "Z" type of incision and lengthen it and sew it back together so it makes it longer and gradually, by changing the cast, stretching it, we were able to get the knee straight.

Q. Now, could you tell us whether the damage to the nerve that caused the paralysis of the foot is of a temporary or permanent nature?

A. The damage at this date appears to be permanent. He has not made a recovery except that he had some improvement in skin sensation down to the ankle. He now is feeling down to the area of the ankle. At first, there was no feeling to the knee, but now it is to the ankle. He has no power to

Dr. Bernard D. Packer.

move the toes or ankle or control the ankle; rather, it is rather rigid and is in a position about like that. (Indicating)

Q. What are the results, if any, of this loss of page 178 } or absence of sensation of the foot? Does that cause any problem?

A. Yes, when there is no feeling or no sensation in the skin of the foot, any little bruise or any little scratch goes unattended, unnoticed, because he doesn't feel it, and it easily becomes infected, more infected than normal skin. He develops a callous on the foot, the callous will break down and there will be a bloody clot underneath the foot. That usually occurs on the ball of the fifth toe where it hits the ground hardest; friction of shoes will produce abrasions that the individual does not recognize and it keeps on and before long he notices the redness. Louis did have trouble with his brace at one time. He developed a friction area at the knee and that became inflamed and the glands in his groin became inflamed and he ran some temperature and we had to keep him in bed. This was after he was walking. We eventually could not put him back in the brace but the brace was a temporary procedure to allow him to walk, to develop his muscles and harden his bones, and it allowed him to go to school, but eventually he was getting so active that the brace rubbing on his limb produced irritation, and we did run into one situation where we finally had to remove the brace, but he was able to get along by that time without it.

Q. Have you finished all of your operative pro- page 179 } cedures on this boy or will further operations be necessary?

A. This child will have to be followed for many years. He is now about seven and a half, almost eight, and we figure that by the time summer vacation arrives, he will be about eight years old and he will be ready to have more work done to try and improve the deformity that he has; the knock-kneed deformity that he has. That can be straightened in a growing child by a relatively simple operative procedure. He will be in the hospital probably a week and then go on home. The purpose of this operation is to slow down the growth on the inner side of the knee. Don't forget his damage is on the outer side of the knee, on the growing side of the knee, so this side has been bruised and damaged and the growth is delayed and hindered, and the inner side was not damaged. We will see that the limb will continue to grow that way, like in your X-rays. The limb starts to bend out. Another thing that he has is that the foot is drawn inward. When the

Dr. Bernard D. Packer.

limb straightens, he will be walking on sort of a razor edge, outer side of his foot. If it is too far turned in, he will have to have an operative procedure to square the foot again and we will wait until he is about twelve or fourteen years of age before we do that. We want the bones to mature before we can finally straighten them. There may be another problem

page 180 } that when all this work is done on the bad limb
that there may be an inequality in the length between the two legs. This leg may be much shorter than the normal leg because he has a number of years to grow. He has about eleven more years ahead of him of growth and height. If we notice, by the time he is fourteen, that the damaged limb is not growing as fast, then we could slow down the growth of the normal leg with an operative procedure in the growing zones above and below the knee, so those are the reconstructive operations that can be anticipated to correct his deformities.

Q. Is there any guarantee that these surgical procedures will, in fact, correct these deformities?

Mr. Ferrell: I will have to object to that, any guarantee; the form of that question. I wouldn't guarantee I am getting home tonight.

The Court: What is the probability and so on?

A. Yes, these are standard procedures that all orthopedic men do regularly and it is the common, everyday type of operation that is done in Crippled Children's hospital all the time. Occasionally, you run into a hard luck type of case, if I may use that word, in which infection develops or some unforeseen or unpredictable complication develops, but generally, the results are good for which you intend the operation to be; that is, to arrest the growth. Occasionally, we have to take these little staples out of the bone,
page 181 } sometimes re-operate or re-set them, but these
are complications that we anticipate and we say that the batting average for this type of operation is good; otherwise, we wouldn't do it over the many years, and it is a standard procedure in Crippled Children's Hospital.

By Mr. Rosner:

Q. Do you know how long Louis was in the hospital?

A. I believe it was 105 days.

Q. During those 105 days, was he confined to the bed?

A. He was confined to the bed up until about the last

Dr. Bernard D. Packer.

month, I would say, when he was up in a wheelchair and finally allowed to go down to the physiotherapy gymnasium and had his exercises down there.

Q. After he was discharged from the hospital, did he go back to the hospital for any reasons?

A. Yes, he continued as an outpatient in the physio-therapy department to try and regain a little more use of his limb; that is, more motion. We must realize, when he left the hospital, the wounds were healed but he still had a stiff knee with a lot of bend in it and we had quite a problem to regain useful movement in the joints and to stretch the joints and it was just an awful problem. At one time, Mrs. Jones, head of the department, gave up on him and couldn't
page 182 } make any progress. There was too much screaming and carrying on.

Mr. Ferrell: I will have to object when somebody else—

The Court: I think if he knows it; it is not hearsay. Is this something somebody told you or did you see him and observe it?

A. No, she kept calling me on the phone.

The Court: No, did you see it?

A. I wasn't right there at the time but she called me up and told me—

Mr. Rosner: Don't go into that.

The Court: Let's skip it.

A. I will have to use the next sentence, the next was Mrs. Jones told me—

The Court: No, skip it.

Mr. Ferrell: I move that it be stricken.

The Court: Disregard it, strike it out, pass to something else.

By Mr. Rosner:

Q. After the physical therapy, did Mr. and Mrs. Schain continue any therapy?

A. They brought the patient to my office and I personally continued the physiotherapy in my office on the table myself

Dr. Bernard D. Packer.

and the reason for that was that I had to continue
page 183 } improving or go to surgery again.

By the Court:

Q. Before I forget it, about five minutes ago you said something about the loss of sensation in the foot area and went into detail about it. At this stage, can it be said that that is permanent or not?

A. Yes.

Q. That is permanent?

A. Yes.

Q. Well, dealing with the sensation, I am not sure that you—

Mr. Rosner: Your Honor, I am going to go over that.

The Court: Well, you go ahead then.

Mr. Rosner: I am going to come back to that.

The Court: I don't want repetition. I just want to get something straight. Go ahead.

By Mr. Rosner:

Q. Doctor, at this time I ask you if you could demonstrate to the jury the actual areas of injury on the plaintiff by having him come forward at this time?

A. Yes, I could demonstrate that.

The Court: Let me say to both counsel and the doctor that we have been over quite a description of what
page 184 } he went through in the hospital and all and I trust that the questions and the doctor's answers now are going to deal with what his present condition is without repetition.

Mr. Rosner: All right, sir.

The Witness: Would you please repeat your question?

By Mr. Rosner:

Q. I would like for you to demonstrate to the jury the entire area of injury and I am going to ask you certain questions as to whether these injuries are permanent or temporary.

The Witness: I think if he would stand right here. (Indicating)

(Louis Ralph Schain, the Plaintiff, stood before the jury.)

Dr. Bernard D. Packer.

The Witness: Take your shoes off. Now, there are no open wounds, they are all dry, have been dry a long time. I will demonstrate where the area of bruising on this picture is located—

Mr. Ferrell: Isn't that repetition.

The Court: Don't repeat any more than you can.

The Witness: I will locate exactly on the patient the area—
if you will turn a little bit—the scar up here is
page 185 } how high the bruising extended. Now, this was a
drain opening because this whole area was undermined. By that, I mean this was all raw and open down here and we were able to get our hand underneath that to see how far it was lifted away and how high the bone is. That is what we had to drain here. Then, we also came frontward and found it was all undermined here and this seemed to be the little pocket area where the blood would collect so we put another drain there, so this whole area, to the extent of his bruising, was undermined tissue. This skin lived, didn't die. He was that lucky, but I was able to get my whole hand underneath; it was all open. This area was all ripped away, came right down here, so when he was lying on the operating table asleep, under an anesthetic, we raised his leg up, we were able to look right clean through between his bone and the flesh. There was a big opening. The flesh fell away about like my hand is now. The damage of the knee joint was on this side. This is the knee and this tissue, when the skin is cut or torn it will separate away. It is rubbery, elastic. You make an incision, the skin will open up. The same way down—open up down to here, and this area of the knee was open and visible.

The Court: That is repetition.

By Mr. Rosner:

Q. Doctor, could you explain, while you have
page 186 } the boy here, about the foot and the loss of sensation and whether there is any other loss as far as the paralysis is concerned?

A. The ankle is stiff. When you attempt to move it, you find it is rigid. It has a good point and he can get along without braces. It has stiffened up to the extent it helps him in walking. The foot, you notice, is turned this way. He is not turning it outward. Try moving your toe. (Addressing the plaintiff.) In attempting to move the toes, he cannot move it but he can move his ankle a little bit. He can push his

Dr. Bernard D. Packer.

ankle downward but he can't pull the ankle up. The incision back here is to lengthen the cord. That is what this is. These scars here were pressure sores from his cast, because he has no feeling from about here down. Show us where it changes, show where the feeling stops.

The Plaintiff: It stops right here, (indicating somewhere along here.

Mr. Ferrell: Your Honor, I will have to object to this kind of procedure.

The Court: He has been sworn before and he testified.

Mr. Ferrell: I didn't know the doctor was a lawyer, too, to ask the questions.

The Court: I think it is proper.

Mr. Ferrell: Exception.

page 187 } By Mr. Rosner:

Q. Now, is there any other explanation that you would like to make with him on the table?

A. Well, our next remaining problem is, you will notice that he is knock-kneed and we figure that as he grows this knock-knee may even get a little worse. He has eleven more years of growth ahead of him, because this side of the knee is growing normally; this side has been damaged, the growth side has been damaged, and the next procedure this summer is to slow up the growth on this side where the skin—

The Court: I think we have been over that. I believe that will be enough.

Mr. Rosner: All right, sir.

The Court: Do you want any cross examination with regard to that?

Mr. Ferrell: No.

(The Plaintiff returned to his seat in the courtroom.)

By Mr. Rosner:

Q. Doctor, from your knowledge of the injuries that you have described and from your observation of the case up to the present time and from your experience as a physician and as an orthopedic surgeon, can you state with a reasonable degree of medical certainty whether the paralysis
page 188 } of the left foot, that of, the loss of sensation and
the loss of motion, is of a temporary or permanent
nature?

Dr. Bernard D. Packer.

A. It is of a permanent nature at this time.

Q. And, Doctor, from your knowledge of the injuries and your observation of the case and with your experience, can you state with a reasonable degree of medical certainty whether the loss of muscle tissue that was demonstrated is of a temporary or permanent nature?

A. It is of a permanent nature.

Q. And are the injuries to the ankle of a temporary or a permanent nature?

A. I think the contracture of the ankle is of a permanent nature.

Q. And are the scarred areas that were demonstrated to the jury, in general, of a temporary or a permanent nature?

A. They are permanent.

Q. Doctor, are you able to state with a reasonable degree of medical certainty what the degree of—well, before I get to that, I think you have already stated how long it will be necessary to keep this boy under your care. If you have not, could you state how long he will have to stay under your care?

A. I estimated that he would have to be under intermittent observation until he finishes his growth. That
page 189 } isn't every day, maybe once a year, twice a year,
something like that, compare X-rays, measurement of leg length and so forth.

Q. Now, as a result of the injuries he has suffered, will he be prevented from engaging in certain activities?

A. Yes, he will be limited, of course.

Q. Could you tell us as much as you can about what activities he will be prevented from engaging in?

A. Well, I would—

Mr. Ferrell: When is this time? Is that of now or after all these operative procedures?

By Mr. Rosner:

Q. After all the operative procedures have been completed and after he has progressed as much as he can from medicine, what activities will he be unable to engage in?

A. I would limit him from any bodily contact sports at school. I would allow him to do things like badminton and things like that, but I certainly wouldn't allow him to play football or baseball; swimming would be fine, but I wouldn't want him to dive, I wouldn't want him to run around the

Dr. Bernard D. Packer.

swimming pool and horse-playing out in the field. He has to be limited and sensible in his violent activities.

Q. Why?

A. He may fall and refracture the limb. The page 190 } limb is thinner, weaker.

Q. Is there any difference between refracturing that limb and his other limb? Would there be any difference?

A. Well, if you can prevent him from fracturing a thin, weakened limb by limiting his activities, I think that is the thing to do; forewarned is forearmed.

Q. Whether the fracture of this limb in the condition that it is in after the accident, would there be any difference between a fracture in that limb and a fracture in a normal limb?

A. Yes, it would be much more of a problem to handle because, should he develop swelling and that scar tissue won't swell and give, we would have an awful problem.

Q. Do you have an opinion, Doctor, based upon a reasonable degree of medical certainty, of the percentage of permanent disability that Louis will have in the left leg after he reaches maximum improvement?

A. I stated that it would be a 50 per cent loss of use of the limb after he reaches maximum improvement.

Q. That is after all these operations that we are talking about?

A. Yes.

Q. What type of employment will he be able to engage in after he has—

page 191 } Mr. Ferrell: I will have to object to that.

The Court: You can't ask that. I think you might state what he can't do.

By Mr. Rosner:

Q. Will he be precluded from any types of employment after he reaches maximum improvement?

A. He wouldn't be acceptable in heavy industry because he has to pass a physical to go in a large plant where there is machinery, any type work like that.

Mr. Ferrell: I will have to object to that. He is getting to be an expert in industry.

The Court: I understand the objection. Doctor, I think you better confine your testimony about what physical acts he can do. There might be some industries that don't give

Dr. Bernard D. Packer.

examinations and would take him regardless of the condition.

Mr. Ferrell: I would like the previous statement to be stricken.

The Court: Disregard it.

By the Court:

Q. What type of physical activity, what type of things can he do? Can he climb telephone poles?

A. I would limit his activity to clerical type of work, office work, school work, sales work, work that does
page 192 } not require a lot of excessive walking up and
downstairs, such as collections and insurance man
who has a budget, go up and down all kinds of flights of stairs.
I preclude that type of work.

By Mr. Rosner:

Q. Doctor, from the first time you treated this boy until today, could you give us an estimate of how many times you have seen him professionally?

The Court: It is immaterial in this suit.

Mr. Ferrell: I make that objection for the record.

Mr. Rosner: I asked him for the purpose of showing that his opinion is based on all of the number of times—

Mr. Ferrell: You have asked his opinion and I haven't objected to it.

By Mr. Rosner:

Q. Doctor, as far as you know, were all the injuries and operations and the disabilities and all the things you testified to caused by the bus accident that he was involved in?

A. Well, I was told that it was a bus that struck him. I didn't see the bus.

Q. As far as the history that you obtained?

A. Yes, it is reasonable.

page 193 } Q. Now, from your knowledge of the extent of
the injuries and of Louis' condition at the time
of the accident, could you tell us whether his recollection of
the events of the accident would be reliable or unreliable?

Mr. Ferrell: Wait a minute. I first don't understand the question so I object to it because I don't understand it. Maybe that is no good, but I would like it read back and for the doctor not to answer it until I can at least get the drift of it.

Dr. Bernard D. Packer.

(The previous question was read.)

Mr. Ferrell: How does he know his condition at the time of the accident? He saw him in the emergency room. I will object to that. I don't think he is qualified.

The Court: I don't know whether he is qualified or not.

Mr. Ferrell: Furthermore, he is trying to impeach his own witness.

Mr. Rosner: No, I am not trying to impeach my own witness.

Mr. Ferrell: He was on the stand. I think that was highly improper.

Mr. Rosner: Let me withdraw that question, Your Honor.

page 194 } By Mr. Rosner:

Q. You stated he was in a state of shock when you saw him in the emergency room?

A. Yes.

Q. When a person is in a state of shock, does that affect—

The Court: What effect, if any?

By Mr. Rosner:

Q. What effect, if any, would the shock condition have upon a person's recollection or ability to recollect events that took place that caused him to go into the shock?

A. Well, many patients, when they come out of shock; do not recall what they said or what happened or how they even got to the hospital. There seems to be a memory lapse there. After they start getting better, they start asking how they got there, what happened. That is not an unusual situation.

Mr. Rosner: That is all. Answer any questions that Mr. Ferrell has.

CROSS EXAMINATION.

By Mr. Ferrell:

Q. And along that line, and then it comes back page 195 } gradually and they can recollect, isn't it true?

A. I would like to give you an example.

Q. Just answer my question. I haven't asked for an example; just yes or no.

James E. Huband.

Mr. Rosner: I think the doctor should be permitted to answer the question in a proper manner.

The Court: In a proper manner, but he can't pick the manner. He will have to answer the question and then explain.

By Mr. Ferrell:

Q. Isn't it also true that some people after they have been through shock, recollect the events that led up to the production of the shock?

A. Yes, many of them will recollect up to the point of the injury and then from then on they don't remember anything. There seems to be a void.

* * * * *

page 206 } JAMES E. HUBAND,
being first duly sworn in behalf of the Plaintiff,
testified as follows:

DIRECT EXAMINATION.

By Mr. Rosner:

Q. Please state your name.

A. James E. Huband.

Q. And what is your occupation?

A. I am self-employed as a private investigator.

Q. Did I call upon you to take certain photographs of the area of the accident in this case?

A. Yes, sir.

Q. I hand you—I think this is going to be Plaintiff's Exhibit No. 10—and I ask you if you can identify that? Tell us where it was taken, what direction you were facing, and when it was taken.

A. This photograph was taken from the center of Lafayette Street, taken in a northerly direction, 31 paces south of the south curb line of Cutshaw Avenue, on November 14, 1960.

Mr. Rosner: I ask that the photograph be admitted.

(The said photograph was marked and filed as Plaintiff's Exhibit No. 10.)

James E. Hubbard.

page 207 } By Mr. Rosner:

Q. I hand you another photograph and ask you to identify that.

A. This photograph is taken of Lafayette Street at the intersection of Cutshaw Avenue. The photograph was taken from the center of the street in a northerly direction, 10 paces south of the south curb line of Cutshaw Avenue. It was also taken on November 14, 1960.

(The said photograph was marked and filed as Plaintiff's Exhibit No. 11.)

Mr. Rosner: I have no further questions.

Mr. Ferrell: I have no questions.

(Witness excused.)

Mr. Rosner: The Plaintiff rests at this point, Your Honor.

* * * * *

page 208 }

* * * * *

In chambers:

The Court: Is the Defendant ready to put his evidence on?

Mr. Wilson: The Defendant wants to make a motion to strike on the basis that there has been no *prima facie* showing of any negligence on the part of Defendant's operator and we rely primarily and exclusively on the case of *Nosay v. Owens*, 193 Va. 343, 1952.

(The motion was argued.)

Mr. Ferrell: In *Clark against Hodges*, even a tricycle was held to be insufficient notice of a child's presence, so I would say that the golf ball in this case is not pertinent under the Hodges case.

(The motion was further argued.)

The Court: Is there anything else you want to add?

Mr. Ferrell: I would like to close. I have some more authorities, the cases on the point about no opportunity to see the child plaintiff in time to avoid hitting the plaintiff, the *Nosay v. Owens*, 193 Va. 343 and the leading case page 209 } of *Boyd v. Brown*, 192 Va. 702, and then *Williams v. Bluebird Cab Co.*, 189 Va. 402 and *Clark v. Hodges*, 185 Va. 431, support our position. In addition, even where there are children present, and when I say children I mean infant children because, as I understand the rule, children from, say, one to seven, there is no contributory negligence; from seven to fourteen, a presumption of no contributory negligence which can't be rebutted, and after that they are on their own, so I take it the rule is applicable to those it is supposed to protect, those who are apt to do impetuous things and not consider the hazards of traffic, *et cetera*, so there is no showing in this case that there are any children to put the operator on notice; at least, no clear showing. The child was over on the lefthand side of the street, it is true, standing there after waiting a period of time, and whether or not the operator could have seen him in the exercise of ordinary care or in any kind of care is very *problematical*. As a matter of fact, the evidence is to the contrary. Of course, he hasn't been put on, but we have to take the case now on the basis which they put it on and they haven't shown, really, the children are present in the sense of those page 210 } cases or the cases I will mention in a moment, but, even so, our motion is proper under *Dickinson v. Ball*, 200 Va. 809 and in *Wash v. Holland*, 166 Va. 45, and *Fagg v. Carney*, 159 Va. 118, and *Messick v. Mason*, 156 Va. 193, and we just get right back to what we have been saying all along in here, that their theory of liability in this case, to us, and on this evidence, we submit is purely conjectural and would not support any finding in favor of the plaintiff.

The Court: I will overrule the motion. I think at this stage, with the driver, particularly, not having testified, that it is just a factual question for the jury on the present basis of the plaintiff's evidence as to whether the driver should have seen the child when he left the curb, leaving out the possible question of some of these cases talking about children in the vicinity. I think it raises, at this stage, a factual question.

Mr. Wilson: Exception.

Mr. Ferrell: Please note our exception.

Note: The following occurred in open court:

page 211 } JOHN D. LEONARD,
being first duly sworn in behalf of the Defendant,
testified as follows:

DIRECT EXAMINATION.

By Mr. Ferrell:

Q. Your name is John D. Leonard?

A. That is correct.

Q. And how old are you, Mr. Leonard?

A. Forty-six.

Q. And where do you work?

A. Virginia Transit Company.

Q. What is your position?

A. I am Claim Agent.

Q. At my request, did you take a picture of bus No. 546, the one that was involved in this accident, looking on the left side of the bus?

A. I did.

Q. Those were taken in June of 1961?

A. They were.

Q. And the pictures that have been previously put in evidence were taken by you?

A. Yes.

Q. At my request, did you measure, yourself, the distances along the left side of that bus and superimpose
page 212 } the various distances in white on the picture that
you had taken?

A. Yes, sir.

Q. The photo that has been handed to you now, does that bear the distances that you measured?

A. Yes, sir, it does.

Q. Now, I want you to briefly state—

Mr. Ferrell: I am going to offer that in evidence as Defendant's Exhibit No. 6.

(The said photograph was marked and filed as Defendant's Exhibit No. 6.)

By Mr. Ferrell:

Q. Starting at the front of the bus and going backwards, the distance from the front of the bus at the bumper, what do you call this around the left rear wheel? That is not a fender but it looks like a fender.

A. It is called a rubber fender around the wheelhouse opening.

John D. Leonard.

Q. Around the wheelhouse opening is how far back?

A. Four feet, eleven and three-quarter inches.

Q. Then, across the wheelhouse to the other side of the rubber fender is how far?

A. Three feet, six and a half inches.

Q. And the total distance from that point to page 213 } the front of the bus is how much?

A. Eight feet, ten inches.

Q. Then, going back to the same rubber guard around the left rear wheel, how far is that back from the front of the bus?

A. A total of twenty-three, three and a quarter inches.

Q. And the distance between the fender guard of the two wheels?

A. Three feet, seven inches.

Q. Now, between the front wheel and the back wheel, that is, the back of the wheelhousing of the left front wheel, to the front of the wheelhousing of the left rear wheel?

A. Fourteen feet, nine inches.

Q. All right, sir, and then the distance from the rear of the wheelhousing on the left rear wheel to the end of the bus is how far?

A. Seven feet, eight and three-quarter inches.

Q. And the total overall length of the bus is how much?

A. Thirty-four feet, seven inches.

Q. And the width of the bus which is not shown on this picture is how far?

A. Eight feet.

page 214 } Q. Now, measured perpendicular to the ground from a straight and level ground, as shown in this picture, what is the distance between the bottom of the body of the bus at the front wheel to the ground?

A. Twelve inches.

Q. And from the bottom of the body of the bus measured in front of the left rear wheel?

A. Thirteen inches.

Mr. Ferrell: Would you pass that to the jury? I have no further questions of Mr. Leonard at this time.

CROSS EXAMINATION.

By Mr. Rosner:

Q. Did you measure the actual wheel itself, Mr. Leonard, on this bus?

Jimmie D. Hepler.

A. I didn't hear the first part.

Q. Did you measure the wheel?

A. The wheel itself? No, just the opening.

Mr. Rosner: I have no further questions.

(The witness stood aside.)

page 215 } JIMMIE D. HEPLER,
being first duly sworn in behalf of the Defendant,
testified as follows:

DIRECT EXAMINATION.

By Mr. Ferrell:

Q. Please state your name.

A. Jimmie Douglas Hepler.

Q. How old are you, Mr. Hepler?

A. Twenty-five, sir.

Q. Where do you work?

A. Virginia Transit Company, sir.

Q. Where do you live?

A. 118 Green Acres Avenue, Richmond.

Q. Where are you from?

A. Covington, Virginia, sir.

Q. How long have you been employed as a bus operator by the Transit Company?

A. Since October, 1959, sir.

Q. Were you operating a Virginia Transit Company bus on Lafayette Street near the intersection of Cutshaw Avenue about 4:30 o'clock in the afternoon of June 7, 1960?

A. Yes, sir, I was.

Q. In which direction was your bus approaching that intersection?

page 216 } A. I was southbound on Lafayette, sir.

Q. Where had you come from, Mr. Hepler; that is, your bus, now?

A. I had come from 10th and Broad, sir.

Q. And came out which direction?

A. I come to Broad and come west on Broad, turned south on Lafayette Street.

Q. And Cutshaw is about how far from where you turn left and came up from Broad Street?

A. Approximately three blocks to there.

Jimmie D. Hepler.

Q. Well, now, tell His Honor and the gentlemen of the jury just what you saw as you approached that intersection?

A. At Lafayette and Cutshaw, proceeding south on Lafayette and Cutshaw, it was three teenagers standing in the bus stop and I was approaching the stop for them and at this time Mr. Iddings' bus was coming north on Lafayette Street. It was a small boy run in front of me there and ran into the side of Mr. Iddings' bus.

Q. Well, now, you were coming into the bus stop when the boy left the curb?

A. Yes, sir, I never saw the boy when he left the curb, no, sir.

Q. Where did you see the boy first?

page 217 } A. When I first saw him he was in the street.

Q. How far into the street from the curb?

A. I would say he was approximately between four and five foot out into the street.

Q. And was he in front of your bus at that time?

A. Yes, sir, he was.

Q. Approximately how far away?

A. I would say between six and seven feet, sir.

Q. And what did you do?

A. I put the brakes on to keep from hitting the small child when he run in front of me; I come to a stop.

Q. How fast were you coming into that bus stop?

A. I would say between five and ten miles an hour.

Q. You put on your brakes hard, is that right?

A. Yes, sir, I did.

Q. And came to a stop in about how far away from the boy, now, is what I am talking about?

A. I'd say it was approximately five feet from the boy.

Q. And could you see the boy's face?

A. No, sir, I did not.

Q. Which way was he headed?

page 218 } A. He was running across the street towards the west side of the street there—I mean, the east side of the street it was; he was running towards—

Q. Was he going straight across or at an angle and, if so, what direction?

A. He was running more or less to an angle.

Q. In which direction?

A. To the east.

Q. Was he at an angle towards Broad Street or Cutshaw?

Jimmie D. Hepler.

A. He was running more or less at an angle towards Broad Street at the time, sir.

Q. Now did he ever turn his face towards your bus?

A. Not to my knowledge, he didn't.

Q. You didn't see him? Did you have your eyes on him all the time?

A. Yes, sir.

Q. Did you see him look up towards the bus of Mr. Iddings?

Mr. Rosner: If Your Honor please, I think there has been enough leading now. I think the witness should be asked what the child did.

Mr. Ferrell: He said he ran across the street. I don't think that is leading.

page 219 } The Court: I don't believe it is leading to ask him if he looked up. I think it is all right to ask him did he look up. You can answer that question.

By Mr. Ferrell:

Q. Go ahead, Mr. Hepler.

A. Well, the boy, as I say, he was running across the street. To me, when he looked—when I put my brakes on he kind of glanced to me and he looks to me like he drops his head and keeps running across the street on the angle.

Q. Did he come in contact with Mr. Iddings' bus?

A. Yes, sir, he did.

Q. Where did he come in contact with Mr. Iddings' bus?

A. He ran into the side of the bus, sir.

Q. I hand you—this is a copy of the same picture, a picture already identified as a copy of one put in evidence—do you have a fountain pen?

A. No, sir.

Q. Would you make an "X" mark at the approximate location where the boy came in contact with Mr. Iddings' bus?

The Court: Is he using Defendant's Exhibit page 220 } No. 6 that has just been introduced?

Mr. Ferrell: No, this is another picture. I am trying to have a clean picture on each one.

A. Well, I put the mark approximately where to me he hit the bus.

Mr. Ferrell: We offer that in evidence as Defendant's Exhibit No. 7.

Jimmie D. Hepler.

(The said photograph was marked and filed as Defendant's Exhibit No. 7.)

By Mr. Ferrell:

Q. Now when the boy came in contact with Mr. Iddings' bus, what did the Iddings' bus, or, rather let's call it the northbound bus, do, if anything?

A. Well, I would say he put the brakes on and pulled his bus as far to the right as he could to avoid hitting the child, sir.

Q. Did he come to a standstill?

A. Yes, sir, he did.

Q. Could you tell whether the brakes had been applied before or after the contact between the boy and the bus?

A. I would say they had been applied, sir.

Q. Before or after?

A. Before he hit him.

page 221 } Q. Did you see what happened to the little boy after he came into collision with the side of the bus?

A. Yes, sir, I did.

Q. What happened?

A. He was knocked to the street and throwed under the rear wheels of the bus, sir.

Q. Now at the time—let's put it this way, before the rear wheel—those are the left rear wheels we are talking about?

A. Yes, sir.

Q. —came in contact with the little boy, could you tell whether or not the brakes had been applied by looking at the the wheels?

A. No, sir, I couldn't.

Q. Did you look at the wheels?

A. No, sir, I was watching the boy as he ran across the street because he was headed for the bus.

Q. In other words, you were taking care of your business?

A. Yes, sir, I was watching my bus.

Mr. Ferrell: To keep this straight, I think I had these other folks draw a ring around it and write their names and I would like for Mr. Hepler to do the same.

page 222 } (The witness marked the photograph.)

Jimmie D. Hepler.

By Mr. Ferrell:

Q. Now as you approached this bus stop were there any vehicles in Lafayette Street ahead of you?

A. Yes, sir, it was one in front of me on Lafayette Street that cut and went up the other street there; he had turned right.

Q. One went up Lafayette and another one turned right?

A. Yes, sir.

Q. You were following behind these vehicles?

A. Yes, sir, I was behind the vehicles.

The Court: You mean one of them left Lafayette Street and turned into Cutshaw?

A. Yes, sir.

The Court: Which one?

A. The one behind—one went straight through and one turned right and went up Cutshaw Avenue.

Mr. Ferrell: Your witness.

CROSS EXAMINATION.

By Mr. Rosner:

Q. What color were the cars that were in front page 223 } of you?

A. Well, I couldn't say that right offhand, what color they were now.

Q. What make cars were they?

A. I don't have the slightest idea about that.

Q. How many people were on your bus at the time?

A. Well, I have one that I got a witness off my bus.

Q. How many people were on the bus? How many passengers were you carrying at the time?

A. It was one I remember of.

Q. One passenger? Isn't it true that Mr. Iddings hit the brakes at the instant that the child ran into the bus?

A. Well, that, as I say, I couldn't say.

Q. So you don't know when he hit the brakes?

A. Well, when we cross an intersection we are supposed to be watching the intersection and all.

Jimmie D. Hepler.

The Court: No, answer the question.

By Mr. Rosner:

Q. Do you or not know when he hit the brakes?

A. No, sir.

Q. You don't know? Do you or not really know the point where the child came in contact with the bus?

A. Yes, sir, he hit the side of the bus.

page 224 } Q. In the center of the bus?

A. I say the side.

Q. You say the center? How close were you to the actual point before the child hit the bus?

A. In relation with his bus?

Q. Yes.

A. I would say at the approximate time our front bumpers were almost even, sir.

Q. Your front bumper was almost even with his front bumper?

Mr. Ferrell: He said the boy, at the time—

By Mr. Rosner:

Q. At the time that the boy—as you say—went into the center of the bus your front bumper was even with Iddings' front bumper? Is that what you are saying?

A. At the time the boy hit the bus?

Q. Yes.

A. Well, they wasn't, as you say, even.

Q. Where was the front of your bus with relation to Iddings' bus?

A. We were coming in contact with each other on Lafayette when it happened, sir.

Q. How far was the front of your bus—was the front of Iddings' bus when the child ran into the bus?
page 225 } Were you at a standstill?

A. No, sir, I was not.

Q. You were still moving when the child ran into the bus?

A. When he run across in front of my bus, that is when I stopped. At the time Mr. Iddings hit him my bus was stopped.

Q. How far was the front of Mr. Iddings' bus from the front of your bus when the child ran into Mr. Iddings' bus?

Jimmie D. Hepler.

A. Well, as I say, approximately they were—the bumpers was approximately even with each other.

Q. That is what you said the first time.

A. That is right.

Q. How fast was Mr. Iddings going?

A. Who is that?

Q. How fast was Mr. Iddings going just before the accident?

A. Well, I would say approximately ten, fifteen miles an hour, sir.

Q. It wasn't raining or anything, was it?

A. No, sir.

Q. The weather was clear?

A. Yes, sir.

page 226 { Q. Did you hear the girls scream?

A. The one on my bus?

Q. I don't know which one. Did you hear any scream?

A. I heard one on my bus holler.

Q. Did you hear anyone scream outside?

A. After the child got hit, yes.

Q. Before the child got hit or at the same time the child got hit?

A. No, sir.

Q. Did you leave any skidmarks when you stopped?

A. No, sir.

Q. So you didn't come to that sudden a stop that you left any skidmarks?

A. Not to leave skidmarks, I would say not.

Q. When the child was in front of your bus and you stopped, he hesitated there for a while, is that correct?

A. Not to my knowledge, he did not.

Q. You didn't see him hesitate?

A. No, sir, I did not.

Q. Did you see the golf ball?

A. No, sir, I haven't seen no golf ball.

Q. Did you see the child run from the east side of the street to the west side of the street?

page 227 { A. No, sir, I did not.

Q. Was there anything to block your vision as you were coming from Broad Street not to see him?

A. As I say, there were two cars in front of me.

Q. How come you didn't see the child until he was four or five feet out into the street?

A. Well, you have poles there, and you have trees. I was coming into a stop for my passengers, I was watching them.

Jimmie D. Hepler.

Q. Were there any poles or trees that prevented you from seeing the child?

A. It is a telephone pole and a tree right there, he could have been behind one of them at the time, yes, sir.

Q. You didn't see him until he was about four or five feet into the street?

A. That is correct.

Q. Where were you looking? What were you looking at?

A. I was watching the cars in front of me and pulling into a stop to pick up my passengers.

Q. Now the child was running at an angle towards Broad Street and towards the eastern side of Lafayette, is that correct?

A. That is right.

page 228 } Q. And he wasn't running too fast, was he?

A. Well, now, it all depends on what you want to call too fast. To me he was running at a good speed, yes.

Mr. Rosner: That is all the questions I have.

By the Court:

Q. How far were you from the boy when you first saw him?

A. Well, as I say, I was about five or six feet from him, sir.

Q. And within what distance—well, now, I am a little confused. You say when you first saw him?

A. Yes, sir.

Q. Well, then, what distance after that did you stop?

A. When I saw him, sir, that is when I put the brakes on and I would say it was about, between two and three feet that I stopped in when I saw the boy run.

Q. And you were at a stop when he still ran out of what your path would have ultimately been?

A. The boy was still running, yes, sir.

Q. If you had continued on he would have been in your path?

A. Yes, sir.

page 229 } Q. He wouldn't have cleared your path?

A. No, sir.

Q. But you stopped prior to the place where he was?

A. Yes, sir.

Carlton Douglas Cox.

RE-DIRECT EXAMINATION.

By Mr. Ferrell:

Q. To clarify that, would you tell His Honor where your right foot was as you were approaching the bus stop and before you saw the boy?

A. Well, as we go into a bus stop, sir, I saw the passengers standing on the corner, and I had taken my foot off of my gas pedal going into my stop, sir.

Q. And you were getting ready to make a normal stop?

A. Yes, sir, for my passengers.

Q. And to put your foot on the brake?

A. Yes, sir.

Q. So had you taken your foot and put it on the brake pedal ready for that, anticipating that?

A. I was slowing down at the time I saw the boy.

Q. So it was just a question of mashing down?

A. Yes, sir, that is right.

page 230 } RE-CROSS EXAMINATION.

By Mr. Rosner:

Q. How far back were you when you saw George Turner?

A. George Turner?

Q. The little boy on the other side of the street; didn't you see him?

A. I never saw the other boy, no, sir.

Mr. Rosner: That is all.

(The witness stood aside.)

CARLTON DOUGLAS COX,
being first duly sworn in behalf of the defendant, testified as follows:

DIRECT EXAMINATION.

By Mr. Ferrell:

Q. Your name is Carlton Douglas Cox?

A. Yes, sir.

Q. How old are you, Mr. Cox?

A. Forty-two.

Q. Where do you work, sir?

page 231 } A. State of Virginia.

Q. More specifically, are you an Engineer with the State Department of Welfare and Institutions?

Carlton Douglas Cox.

A. Yes, sir.

Q. Where do you live, Mr. Cox?

A. 4306 Patterson Avenue.

Q. On June 7, 1960 were you a passenger on a southbound bus about 4:30 in the afternoon of that day as it approached the intersection of Cutshaw Avenue and Lafayette Street?

A. Yes, sir, I was.

Q. Would you tell His Honor and gentlemen of the jury just what happened, as far as you know?

A. The bus was approaching the intersection of Cutshaw Avenue on Lafayette Street and I was, oh, possibly the third seat in the back of the driver. I heard a scream on the outside of the bus and I looked out, I saw a little boy on the ground in front of the left rear wheel of the bus; he was on his face. The wheels of the bus were not turning over, he was being pushed along. His left leg was under or directly in front of the wheel of the bus and being pushed along by the bus. The bus I was on came to a stop and I got out and went to the house on the corner and called an ambulance and went back to the little boy.

page 232 } Q. Now, how far did the northbound bus go from the point where you saw it until it stopped, came to rest?

A. It was a very short distance. I don't know that I actually saw the bus stop but it was a very short distance.

Q. Now at the time that you saw this bus in relation to your bus, where was the front of that northbound bus?

A. I suppose the front—

Q. Let me put it this way, in relation to where you were sitting, the third cross seat?

A. It was almost directly across from where I was sitting.

Mr. Ferrell: I have no further questions.

CROSS EXAMINATION.

By Mr. Rosner:

Q. Mr. Cox, the scream of the girl outside is what attached your attention to the accident?

A. That is correct.

Q. You did not see anything going on before the scream?

A. Nothing at all before that.

page 233 } Q. Nothing had attracted your attention?

A. No, sir.

Carlton Douglas Cox.

Q. Your bus hadn't come to a sudden stop before you heard the scream, did it?

A. No, it didn't, he was stopping at the time. At the time I heard the scream he was coming into what I would call a normal stop.

Q. And how many other people were on the bus with you that you remember?

A. I couldn't even guess.

Q. Were there any other people?

A. There were other people, possibly five or six; I really don't know.

Q. You weren't the only passenger on that bus, were you?

A. No.

Q. And you don't know what happened before your eye went to the scene?

A. No, I don't.

Q. You don't know what part of the bus first struck the boy?

A. No, I don't.

page 234 } By Mr. Ferrell:

Q. You did not give your name to Mr. Hepler, the operator, though, did you?

A. No.

Q. And, as a matter of fact, the first person you saw in connection with this accident was Mr. James E. Huband, Jr., the investigator for the plaintiff, isn't that right?

A. I don't remember his name but an investigator for the plaintiff did call on me one evening sometime after that.

By Mr. Rosner:

Q. You heard a scream; did you hear any screech of brakes?

A. Not that I recall.

Mr. Rosner: That is all.

(Witness excused.)

BILL COOLEY,

being first duly sworn in behalf of the Defendant, testified as follows:

DIRECT EXAMINATION.

By Mr. Ferrell:

page 235 } Q. Please state your name, sir.

A. Bill Cooley.

Q. And where do you work, Mr. Cooley?

A. Richmond Linen Service.

Q. And how old are you, sir?

A. Thirty-three.

Q. Did you see an accident at the intersection of Cutshaw and Lafayette Street at about 4:30 in the afternoon on June 7, 1960?

A. Yes, sir, I did.

Q. Where were you when you witnessed this accident.

A. I was sitting down the street facing the accident.

Q. Now, what were you sitting in?

A. Sitting in my car.

Q. And where was it parked?

A. Parked next to the curb on Lafayette.

Q. What building?

A. On Lafayette Street right opposite the Royal Indemnity Insurance building.

Q. Now, which way were you looking?

A. I was looking south, facing—

Q. South down Lafayette Street?

A. That is right.

page 236 } Q. Well, now, what did you see?

A. Well, I was sitting there and I noticed this bus approaching me. I always look for the bus because there was a lady that came out of the building there a couple of minutes before 4:30 so she could catch the bus and I formed the habit of watching for the bus to see how much on time she was, you know, when she came out of the building. She had just come out of the building when I noticed the bus coming down the street. When I was observing the bus, I noticed the bus kind of ducked to the curb like it was going to pick up a passenger and I noticed this small child running across the street. Well, when the child come in contact with the bus, I realized then that it had struck the bus or that the bus had hit it, and I noticed the child went into the air along beside the bus up almost parallel with the windows from where I was sitting. I immediately jumped out of the car and asked the lady there on the corner would she

Bill Cooley.

please go in and summon an ambulance because a child had just been run over up there in the next block and she stated to me she was waiting for a bus, or something to that effect, that she didn't have time, or something, so I immediately run into the building there to try to get some help up there or get an ambulance up there for the child.

Q. When you first saw the child, Mr. Cooley, page 237 } approximately how far would you estimate from where you were sitting the child was from the lefthand side of the bus or the side of the bus that he later came in contact with?

A. I imagine the child was somewhere just off center of the middle of the street. He might have been near the middle of the street, but when the bus ducked to the right, I got a right good view of him; you know, him running. I could see more—I got a clearer view of it, in other words.

Q. Approximately what distance? You place the boy approximately the center of the street. How far was he from the bus at that particular split second?

A. I couldn't say definitely. I would say from five to eight foot before I seen him hit the bus.

Q. Did I understand you to say a minute ago that the bus had already turned to its right before—

A. I was under the impression it was going to pick up a passenger. I didn't know if there was a bus stop there or what. I noticed the bus looked like it swerved to come in.

Q. What I am driving at, had the bus swerved to the right before the boy came in contact with it?

A. Oh, definitely, yes, sir.

Q. Do you wear glasses?

A. No, sir.

Q. Do you need glasses, as far as you know?

page 238 } A. No, sir.

Q. Well, could you tell us something about the speed of the boy? How was he running? How would you describe it?

A. Just like any child would run, he was running at a right good—I don't know how fast the child can run, but he was running like any ordinary child would run. He wasn't walking, I will say that. He was running.

Q. Could you see the attitude of his head, whether he had it up or—

A. No, sir, I couldn't, no.

Q. And you went to the scene of the accident?

A. After I summoned help I went back and jumped in my

Bill Cooley.

car and parked my car in the alley in front of the bus and went back there to see if I could offer some assistance or some help to the child, but there was two or three people there that was helping him at the time and it kindly upset me and I went back and got in my car because I knew there wasn't anything I could do then, so I got in my car and went home.

Q. Did you give your name to the operator of the bus involved?

A. Yes, sir.

Q. Mr. Iddings? Did you find out his name?
page 239 } A. No, there was another bus parked there and I went on the bus and told the man that I felt like the man wasn't at fault—

Mr. Rosner: I object to that and ask that it be stricken.

The Court: Gentlemen of the jury, disregard his statement.

A. (Continuing) I went on the bus and told the man—

The Court: Don't say anything you said.

By Mr. Ferrell:

Q. You just gave him your name?

A. Yes, sir.

Q. Name and address?

A. Gave the other bus driver my name because this other man that was involved in the accident looked like he was real nervous and shook up, so I gave this other man my name, yes, sir.

Mr. Ferrell: Answer the questions of these gentlemen.

CROSS EXAMINATION.

By Mr. Rosner:

Q. Mr. Cooley, the left front part of the bus
page 240 } came in contact with the boy, is that correct?

A. The side of the bus.

Q. At the front, is that correct. right by the left front wheel?

A. Right, yes, sir.

Q. It wasn't in the middle of the side of the bus, was it?

A. I assumed, from the distance he went in the air, that he

Bill Cooley.

hit the wheel, because the bus had turned on an angle. I could see the front of the bus hadn't hit him. Now where on the side of the bus, I just assumed in my own mind that the wheel must have hit him for him to go up in the air like he did.

Q. How long did you see the child running? Did you see him starting out from the curb or was your view blocked?

A. No, sir, he was in the street when I seen him. He was near the middle of the street.

Q. Near the middle of the street when you first saw him?

A. Yes, sir.

Q. How far away were you from the scene of this accident?

A. I went and stepped it off, 175 steps, approximately. page 241 }

Q. Approximately three feet a step, is that right?

A. Yes, sir.

The Court: Were you between Augusta and Cutshaw?

Mr. Rosner: No, sir, he was below Augusta.

The Court: I am asking him.

The Witness: Where is this Royal Globe Insurance office?

Mr. Ferrell: It is not on the plat.

The Witness: Was this right here the point of the accident? (Indicating)

The Court: No, that is on the other side.

The Witness: I am looking the wrong way.

The Court: That is going north.

The Witness: Am I looking south on the plat here now?

The Court: Yes.

The Witness: Then I was parked right here. (Indicating map) No, this isn't right.

The Court: Were you nearer Broad Street?

A. I was about a block off of Broad. See, there was a street runs between me and Broad.

page 242 } By the Court:

Q. Was there also a street between you and Cutshaw?

A. Yes, sir.

Q. What was that, Augusta?

A. Where was the accident on this map?

Mr. Ferrell: Cutshaw and Lafayette.

Officer H. C. Birkhead.

The Court: Cutshaw and Lafayette, right in the middle of it.

Mr. Ferrell: Near Cutshaw, north of Cutshaw and Lafayette and south of you.

The Court: What I am driving at, you weren't in the block of the accident, is that right?

A. No, sir.

By Mr. Rosner:

Q. According to your estimate of 175 steps, that would place you about 525 feet from the point of the accident, is that right? 175 times 3?

A. If you are figuring on three feet of steps, yes, sir.

Q. 525 feet, and you were sitting in a car?

A. Yes, sir.

Mr. Rosner: That is all.

(Witness excused.)

page 243 } OFFICER H. C. BIRCKHEAD,
being first duly sworn in behalf of the Defendant,
testified as follows:

DIRECT EXAMINATION.

By Mr. Ferrell:

Q. I am sorry we disturbed your slumber.

A. That is all right.

Q. You are on night duty now?

A. Yes, sir.

Q. You are with the State Police?

A. Yes, sir.

Q. And you are Sergeant H. C. Birkhead?

A. Yes, sir.

Q. Where do you live, sir?

A. I live at 4001 Cutshaw Avenue, which is right on the corner, corner house.

Q. I believe if you will turn to your right, that is shown on this map, is it not?

A. Yes, sir.

Q. Now, on Tuesday, June 7, 1960, at about 4:30 in the afternoon, what were you doing?

Officer H. C. Birkhead.

A. That was my day off and I was at the rear of the house doing some painting.

The Court: May he point out which is his page 244 } house?

The Witness: Right here. (Indicating map)

By Mr. Ferrell:

Q. So you were in the back yard?

A. Yes, sir.

Q. Painting? What happened next, and don't repeat, just as far as information received and not the statements that caused you to take certain action.

A. I received information that a child had been injured and it was thought that a bus was involved out in front of the house.

Q. What did you do?

A. I immediately went to the scene.

Q. And ascertained that a child had been injured?

A. Yes, sir.

Q. Then what did you do?

A. I saw the condition of the child. I went back to my police car which was parked in front of the house and radioed to our headquarters to send an ambulance from the Police Department to the scene and then I went to the back of my police car and got a paper disposal blanket that we carry in our cars for such emergencies, and went back and put this blanket over the child.

Q. I have handed you some pictures, Officer Birkhead, that have previously been put in evidence and I want page 245 } you to look at those and what has been referred to as a circular blood spot and I want to ask you whether or not the child was in that area; is that right, the circular blood spot?

A. Yes, sir, that is where the child was.

Q. Stand up here so the jury can see it, and His Honor, too. In which direction? This is Defendant's Exhibit No. 3. In which direction was the boy's head?

A. The boy's head was to the upper part of this picture and his feet were to the back.

Q. And that would be in a northerly direction?

A. Yes, sir.

Q. Now, was his head in this area where the blood is or was his head above it or below it or just what?

Officer H. C. Birckhead.

A. His head was just above this area because, in seeing what I could do to help the boy, I could see no injury about his head; it was in the lower part of his body.

Q. Did you go to his head?

A. Yes, sir, because the boy was talking and we went to his head to reassure him and to keep him calm until the ambulance got there.

Q. Now, in relation to the bus that was parked over here, we want to clarify at approximately what portion of the bus near the back end of the bus, and I show you Defendant's Exhibit No. 7; what is this spot, because the perspective in this picture is somewhat uncertain.

A. It is in this area here. (Indicating photograph)

The Court: Could you state in inches or feet or what-not what you are referring to?

A. I would say, sir, that the boy's head was, looking at this diagram, would be approximately two feet from the rear of the bus and his feet right at the rear, about here or maybe feet sticking out just a little.

By Mr. Ferrell:

Q. So that blood spot would be approximately how many feet from the rear of the bus? That is what we are trying to get.

A. I would say anywhere from two to three feet, hazarding a guess without any actual measurements.

Q. Did you attempt to look to your left when you were up near the little boy's head assuring him?

A. Yes, sir, and the bus was there because there were some people standing on the sidewalk here and I had been informed at the time—

The Court: No.

By Mr. Ferrell:

Q. Were there a lot of people milling around up there?

A. Yes, sir.

page 247 } Q. Of course, a lot of people, that is awfully general, but you estimated how many people were there when you first arrived at the scene and before you went and got the paper blanket?

Mrs. William M. Turner, Jr.

A. I would estimate there was at least 30, 40 people around, not actually counting, strictly.

Q. Did you see any golf ball?

A. No, sir, not that I recall.

Q. You said a moment ago that the little boy made some sort of exclamation. Would you state what that was?

A. The little boy told me that he hoped this wouldn't keep him from going to school the next day.

Q. Was he crying?

A. No, sir.

Mr. Ferrell: Your witness.

Mr. Rosner: No questions.

(Witness excused.)

MRS. WILLIAM M. TURNER, JR.

being first duly sworn in behalf and of the Defendant, testified as follows:

DIRECT EXAMINATION.

By Mr. Ferrell:

Q. Are you Mrs. William M. Turner, Jr.?
page 248 } A. I am.

Q. On this plat,—I have forgotten the number, Plaintiff's Exhibit No. 1—is 3921 Cutshaw Avenue. Is that where you live?

A. Yes.

Q. And behind that, according to that plat, is an alley and a chain fence?

A. That is right.

Q. Now, Mrs. Turner, you are the mother of the little boy who was in court yesterday, George Turner?

A. I am.

Q. On the afternoon of June 7, 1960, were George and Louis Schain playing together, to your knowledge?

A. Yes.

Q. I hand you this picture and ask you if, at my request, you went out in the back yard behind your house with Mr. Leonard, who sits down here, and pointed out the area where they were playing, and does that picture correctly portray the area?

A. Yes.

Mrs. William M. Turner, Jr.

The Court: Just a minute.

Mr. Rosner: We will let him finish. When he gets ready to introduce it, I object to it.

Mr. Ferrell: I haven't linked it up yet, but page 249 } I have to take it step by step.

The Court: Go ahead.

By Mr. Ferrell:

Q. Is that what appears to the eye as you look through the chain fence behind your house or the apartment house, I believe it is, isn't it?

A. Yes.

Q. Would you go over there to that plat and indicate with a green pencil about where that picture is taken from, the center?

The Court: Where the camera was sitting?

Mr. Ferrell: No, the area that takes in, just in general.

A. This is my house right here and it is this end of the area. (Indicating map) Is that what you want?

By Mr. Ferrell:

Q. Just square it off, just take your pencil and include it, the area that is shown.

A. I say it would be about that. (Indicating)

Q. Let's put it this way. Did you go out prior to the time of the accident and see the children playing together?

A. I did.

Q. And what did you do from that particular page 250 } moment of time?

A. Well, the reason I went out, I was going to see a neighbor. I went to tell George where I was going in case something happened or he wanted me, he could get me.

Q. And that is where they were when you gave him that message?

A. Yes.

Q. And then you went where?

A. Mrs. Peoples, 3918 Cutshaw, Apartment 1.

Q. That is down the street a little bit?

A. That is two doors down. In fact, an apartment house between my house and her apartment.

Q. So that would be east towards the city?

A. That is right.

Mrs. William M. Turner, Jr.

Q. And how long, approximately, after that were you advised of the accident?

A. Oh, I don't know, I really cannot—

Q. Was it late in the afternoon? Was it later, much later, or just a few minutes later, few hours later?

A. Oh, no, it wasn't hours. In minutes, but how many, I could not say.

Q. It was a matter of minutes?

A. I can't say how many minutes, you understand.

The Court: Was it as much as a half an hour?

page 251 } A. Well, it could have been as much as a half an hour, I just don't remember.

The Court: Was it as much as an hour?

A. No, I don't believe it was as much as an hour.

Mr. Ferrell: Could I have that picture identified? I realize we have to put Mr. Leonard on the stand to make it admissible in evidence.

The Court: Defendant's tendered exhibit A.

(The said photograph was tendered as Defendant's Exhibit A.)

By Mr. Ferrell:

Q. I hand you, Mrs. Turner, Defendant's Exhibit No. 2 which had previously been introduced in evidence as the picture made by the police officer who investigated the accident and I want to ask you if you will look at this picture and advise us whether in front of the bus it shows an automobile that you know something about?

A. My husband's car is the second automobile, is all I know. This one (indicating).

Q. The second car? Was that parked up there when you went down the street?

A. I don't know.

Q. You don't know when that was parked there?
page 252 } A. I imagine it was. He was at work at the time and I didn't drive then, so I imagine he had left it there during the course of the day.

Q. But that is your automobile?

A. I am sure it is.

Sally Kincannon.

Q. Put a little ring around it and put a "T" for Turner.

The Court: What is that, by the side of the car?

Mr. Ferrell: It is on the bumper of the car that was parked on the east side of Lafayette Street between Cutshaw Avenue and this alley.

The Witness: Yes.

Mr. Ferrell: I have no further questions, Mrs. Turner.

CROSS EXAMINATION.

By Mr. Rosner:

Q. You know nothing about the accident itself that you saw with your own eyes, do you?

A. No, I didn't see the accident.

Mr. Rosner: No further questions. Just one minute.

Q. When you went outside, did you see any of
page 253 } the other children in the neighborhood besides
George and Louis?

A. You mean when I went to tell George where I was going?

Q. Yes.

A. No, I did not.

Mr. Rosner: That is all.

(Witness excused.)

SALLY KINCANNON,

being first duly sworn in behalf of the Defendant, testified as follows:

DIRECT EXAMINATION.

By Mr. Ferrell:

Q. Is your name Sally Kincannon?

A. Yes, sir.

Q. Where do you live, Sally?

A. 6116 Patterson Avenue.

Q. Where do you go to school?

A. Thomas Jefferson.

Q. What class are you in?

A. I am a senior this year.

Sally Kincannon.

Q. Did you witness any part of an accident at page 254 } the corner of Cutshaw Avenue and Lafayette Street about 4:30 in the afternoon Tuesday, June 7, 1960?

A. Yes, sir.

Q. Where were you?

A. I was on the southbound Lafayette bus.

Q. And where were you sitting?

A. I was on the right-hand long seat of the bus in the front.

Q. And just tell His Honor and the gentlemen of the jury just what you saw and heard at that time.

A. Well, I was on this bus coming towards the stop at Lafayette and Cutshaw and we were nearing the stop when I saw a little boy run across Lafayette Street and into the street and where I was sitting I saw him run into the northbound bus approximately three or four feet in front of the emergency door.

Q. Now when you first saw this little boy, where was he in relation to the west curb, the bus stop; curb, and the bus stop?

A. Let's see, it seemed that he was about—he was not near the sign, the bus stop sign, he was several feet down from it and when I saw him my bus was about a car's length from the little boy when I noticed him.

Q. Where was he at that particular moment, page 255 } now? I want to fix it first from the west curb of the street and then the distance in front of you, you or the bus, whichever way you estimate it.

A. I'd say he was about ten feet from the corner.

Q. From what corner?

A. From the corner of Lafayette and Cutshaw.

By the Court:

Q. Was he on the sidewalk or in the street or what?

A. On the curb.

Q. Up on the curb or down?

A. He was up on the curb when I first noticed him.

By Mr. Ferrell:

Q. He ran from the curb?

A. Yes, sir.

Q. And when he ran from the curb, and the instant he left the curb, approximately how far was the front of your bus from the boy?

Sally Kincannon.

A. Approximately a car's length, sixteen feet.

Q. Did your bus do anything, the bus you were riding?

A. The bus I was riding on was going—well, in my judgment it was going slowly because we were nearing the bus stop and at the same time I noticed the little boy it
page 256 } seemed to slow even more and came to a stop with a jolt.

Q. And which direction across the street, now, was the little boy going? Was he going straight across the street from the curb or was he going at an angle and, if so, what angle?

A. He was going at an angle, it would be northeast.

Q. Now I hand you a picture that's already been put in evidence, bus #546, which has been identified as the northbound bus and I would like for you, Sally, to take this pen and put an "X" mark at approximately the location on the side of the bus you testified a moment ago that he ran into.

(The witness marked the photograph.)

The Court: That is Defendant's Exhibit No. 8.

(The said photograph was marked and filed as Defendant's Exhibit No. 8.)

By Mr. Ferrell:

Q. Now at the instant—strike that. Did you notice the way the head of the little boy was turned?

A. No, sir, I didn't.

Q. Did you notice the front of your bus and the front of the northbound bus at or about the time that the
page 257 } little boy ran into the side of the bus as you have indicated?

A. No, I don't recall.

Q. Now, when you saw—I'll put it this way, when the little boy came in contact with the side of the northbound bus could you tell whether or not that bus was breaking its speed?

A. Well, I couldn't really approximate the speed in miles per hour but I could tell it was not speeding.

Q. What I want to know, was it coming to a standstill or not at the instant that the boy came in contact with it?

A. It appeared to be slowing from where I was sitting.

Q. What happened after the little boy came in contact with the northbound bus?

A. I didn't see any of that. I just saw him come into contact with the bus. I didn't see any more.

Sally Kincannon.

Q. Did that bus, the northbound bus, ever come to a standstill?

A. Yes, it did.

Q. How far did it move before it came to a standstill, approximately?

A. I didn't notice any of that, I just noticed where my bus was and where the northbound bus was when they page 258 } did come to a standstill.

Q. Could you state whether or not the front of the northbound bus had passed the front of your bus before the little boy ran into the side—

Mr. Rosner: If Your Honor please, I think the witness has testified to that.

Mr. Ferrell: No, I asked afterwards; before, now.

The Court: You saw the impact of the boy and the bus?

A. Yes, I did.

By the Court:

Q. And you were sitting on the right-hand long seat up in the front?

A. Yes, sir.

Q. Was your head turned to the right or straight in front of you when you saw that?

A. It was straight in front of me. I was over on this side towards the curb so that I was looking this way. (Indicating)

Q. Was the other bus opposite you at that time?

A. Yes, sir, it was opposite me.

By Mr. Ferrell:

Q. When you say the other bus was opposite page 259 } you, what portion of the other bus? If you will, look at that picture. Would you say what is opposite you?

A. When I saw the boy come into contact?

A. Yes.

A. Let's see, if I had looked straight across I imagine the very front of the bus was opposite me.

Q. You are putting your finger, and let's take that red thing, as to the center; let's put it, the center of what you saw as the part of the bus that was opposite you. Draw a ring around it.

(The witness marked the photograph.)

Sally Kincannon.

Q. Now on the right-side seat of the southbound bus, where were you sitting on that seat because it's a pretty long one?

A. I was the farthest seat to the front.

Q. You were the farthest one, which would make it right next to the front door?

A. Yes, sir.

Q. But it would be north of the front seat, going south?

A. Yes.

Q. And south of the front door going north?

A. Yes, sir.

Q. Did you give your name to the operator of page 260 } your bus?

A. Yes, I did.

Q. Let me ask you one more question. Approximately how far or how much did your bus miss the little boy?

A. When I first saw him we were about a car's length from him and I would say we missed him by about from eight to ten feet.

Mr. Ferrell: Answer the questions of these gentlemen, Sally.

CROSS EXAMINATION.

By Mr. Rosner:

Q. Sally, were there any cars in front of the bus that you were riding on

A. I couldn't—I know there was at least one car that I noticed; there could have been more.

Q. How far in front of you was it?

A. I would say about two car lengths in front of me.

Q. Now, did you hear the girls—you know the girls who were standing on the bus stop? They were friends of yours?

A. Yes.

page 261 } Q. Did you hear them scream?

A. No.

Q. You didn't hear them scream?

A. No.

Q. Did you scream?

A. I don't think I did.

Q. Now, make believe that you are sitting in the bus seat right now, before your attention was attracted to the accident which way was your head turned? Place your head in the position it was before your attention was attracted to the accident.

Sally Kincannon.

Q. I had been reading a book and when we turned from Broad Street onto Lafayette Street I was just looking out of the window opposite me and then I turned as we were nearing the bus stop and I had just turned my head when I noticed the little boy.

Q. You saw him running all the way from the curb?

A. Yes, sir.

Q. Until the time that he hit the bus?

A. Yes, sir.

Q. Is that right?

A. Yes, sir.

Q. And you state that he started out about ten feet from the corner, is that right?

page 262 } A. Yes.

Q. Now, Sally, could you pick up that scale—

The Court: I would like her to clear up the ten feet from the corner. I don't know what she means by "corner."

By Mr. Rosner:

Q. This is the scale, Sally, and each one of these little lines is a foot and where you see one, that is ten feet; two is twenty feet, and so on. Could you, with this scale, on this plat right here, show us where the boy was when he started out?

A. I was measuring from the sidewalk. Well, I noticed him in back of the tree; that would be more than ten feet.

Q. How far was he in back of the tree?

A. I couldn't say for sure. I didn't notice that accurately but I did notice he was in back of the tree somewhere around in this area. (Indicating map.)

Q. All right, and you state that you did not hear a scream from any of the three girls outside of the bus?

A. No, I didn't notice any scream.

Q. Were you too far away to hear any scream or—

A. I just don't think I would have noticed, really. I was very upset when—you know, to see anything and
page 263 } I stood up in my seat and I just don't think I would have noticed a scream. I don't know whether I was too far away to hear or not.

Q. Was the little boy chasing a ball?

A. I didn't see a ball. I didn't see any of that.

Q. How long did it take the little boy to run from where he started out until he came in contact with the side of the bus?

Sally Kincannon.

A. Well, as well as I recall, it was just a matter of minutes. I couldn't say accurately, really.

Q. Sally, do you remember talking to—

By the Court:

Q. What was your answer to that question?

A. I couldn't really say definitely, it was just a minute or two, it seemed to me.

Q. A minute or two? Do you mean that, now? We have passed about fifteen seconds since you said your answer.

Q. It was just split second, it seemed.

Q. The reporter is taking all this down and when you say a minute or two, I just want to know whether you mean that or not.

A. Well, split second; it didn't seem like any page 264 } time at all.

By Mr. Rosner:

Q. Sally, you remember on September 12, 1961, talking to James E. Huband, Jr., who is an investigator who I sent out to find out what witnesses knew about this accident? Do you remember speaking with him?

A. Yes, sir.

Q. Would you recognize him if you saw him?

A. Yes, sir.

Q. In fact, did you see him around court yesterday and today?

A. Yes, sir.

Q. Do you remember talking to him around 4:00 o'clock at your home?

A. Yes.

Q. Do you remember telling him that when you saw the little boy running from the right-hand side of the street that you were between a half a block and a block away? Do you remember that?

A. I don't know.

Q. Let me ask you this, have you talked to anyone else about this accident since you talked to Mr. Huband?

A. Do you mean any other people that were page 265 } involved with it?

Q. Yes.

A. No, sir, I haven't talked with them. I have been over, you know, my case, what I saw.

Q. Yes, after you talked to Mr. Huband?

A. Yes.

Sally Kincannon.

Q. How many times have you talked to other people since you talked with Mr. Huband?

A. One time.

Q. And when was that?

A. Last Tuesday.

Q. Now, getting back to this statement, where did you talk to Mr. Huband, at your house?

A. At my home.

Q. Was anybody present?

A. My mother.

Q. Do you remember telling him that you were between a half a block and a block away from the accident when you saw the little boy run from the right-hand side of the street towards the left side?

A. I don't recall what distance I said. I just couldn't say for sure whether I said that or not.

Q. Would your memory have been clearer back then than it is today?
page 266 } A. I don't know.

Mr. Rosner: I have no further questions.

Mr. Ferrell: Sally, one or two questions.

RE-DIRECT EXAMINATION.

By Mr. Ferrell:

Q. You were summoned and received a summons from the plaintiff to testify in this case?

A. Yes, sir.

Q. And you came to court yesterday, I believe, with Mr.—what is his name?

A. I came in a cab yesterday morning.

Q. Well, you were going to ride home, I believe, with Mr. Huband?

A. Yes, I was.

Q. But that was cancelled?

A. Yes, sir.

Q. And did you talk to Mr. Rosner or Mr. Seymour Horwitz about the case again before you were released?

A. No, sir.

Q. They did release you, though, yesterday?

A. Yes, sir.

Q. And told you as far as they were concerned
page 267 } you need not come?

A. Yes, sir.

Sally Kincannon.

By Mr. Rosner:

Q. Who did you go home with yesterday, Sally?

A. Mr. Fugate.

Q. Who does he work for?

A. I don't know.

Q. Mr. Fugate of the Virginia Transit Company?

A. I guess so, yes.

Mr. Ferrell: She said she didn't know.

Mr. Rosner: We will find out when Mr. Fugate gets here.

(Witness excused.)

Mr. Ferrell: I want to put Mr. Iddings on the stand.

Mr. Rosner: May I bring Miss Kincannon back for one more question?

The Court: I excused her.

Mr. Rosner: I have one more question.

The Court: You can recall her as a witness if you want.

Note: Sally Kincannon was recalled to the stand by the plaintiff, and further testified as follows:

page 268 } By Mr. Rosner:

Q. Sally, you were not wearing your glasses when you were on the bus, were you?

A. Yes, sir, I was.

Q. You do wear glasses?

A. Yes, sir.

Q. What is wrong with your eyes?

A. I am nearsighted.

Q. I see. You are not wearing them now?

A. I just took them off when I went in there because I have a headache.

The Court: Now are you gentlemen through with this witness?

Mr. Rosner: Yes, sir.

Mr. Ferrell: Yes, sir.

(Witness excused.)

HAROLD J. IDDINGS,

being first duly sworn in behalf of the Defendant, testified as follows:

DIRECT EXAMINATION.

By Mr. Ferrell:

Q. Your name is Harold J. Iddings?
page 269 } A. Yes, sir.

Q. Mr. Iddings, you are employed by the Virginia Transit Company?

A. Yes, sir.

Q. As a bus operator?

A. Yes, sir.

Q. How long have you been working for the Virginia Transit Company as a bus operator?

A. It was nine years the 11th day of February.

Q. Well, was the bus that you were operating on the afternoon of Tuesday, June 7, 1960 involved in an accident north of the intersection of Lafayette and Cutshaw?

A. Yes, sir.

Q. Where had the bus run, originated, that you were driving?

A. I started out from Lafayette and Grove Avenue. I was going to Church Hill.

Q. And that is to the south of this intersection?

A. Yes, sir.

Q. And your route takes you—just give us some of the streets that you cross going northwardly towards Broad.

A. Well, there was Grace Street, Franklin Street, Lafayette, Monument.

page 270 } Q. Now, did you have any passengers on your bus as you approached this intersection?

A. No, sir, I didn't.

Q. Were there any persons wanting to get on your bus at the bus stop that is shown on this plat over on the southeast corner?

A. No, sir, there was nobody there.

Q. How fast was your bus going as you approached the intersection?

A. As it approached the intersection I slowed down and came to the intersection probably five miles an hour.

Q. All right, then what did you do?

A. I looked, everything was clear, and I proceeded on my way.

Q. Well, were there any vehicles ahead of your bus, directly ahead, within, say, a block or so?

Harold J. Iddings.

A. Traveling the same way?

Q. Yes, sir.

A. No, sir, there wasn't nothing traveling the same way.

Q. Were there any vehicles in the, say, within a block of your bus traveling in the opposite direction as you came up across the intersection of Cutshaw and Lafayette?

page 271 } A. Yes, sir, there were.

Q. Tell us just what they were.

A. Well, best of my recollection there was two of them.

Q. Two what?

A. Two cars coming, going south.

Q. And you observed them as you crossed the intersection?

A. As I crossed the intersection, one came straight ahead, the other made a left-hand turn—I mean, a right-hand turn.

Q. To your left?

A. To my left as I was traveling but to his right on Cutshaw.

Q. Was there anything southbound on Lafayette behind these two automobiles that you have just described?

A. There was another bus.

Q. Well, now, just tell us, His Honor and gentlemen of the jury, just what happened, now, after this.

A. Well, I seen some high school girls standing on the corner waiting on another bus that was southbound and everything was clear, and as I proceeded on by, traveling this way, we got something like this (indicating) and he was coming into the bus stop—

page 272 } Q. Now "he" is how, the southbound bus?

A. The southbound bus.

Q. Mr. Hepler?

A. Mr. Hepler.

Q. All right.

A. And he hit his brakes because on account of the gravel—

Q. How can you tell when he hit his brakes?

A. On the gravel was loose and it made a sound and it caused me to look in my rear view mirror.

Q. To see what?

A. To see what was happening, and I seen a little boy.

Q. Where was he?

A. He was in front of the other bus, the southbound bus, but he was running sort of south—I mean, north-east, right approximately six feet from my bus.

Q. Six feet measured from the side of your bus?

A. Yes, sir.

Harold J. Iddings.

Q. The left-hand side?

A. Yes, sir.

Q. About how far back of you?

A. Well, I couldn't say for sure, but—

Q. Did you observe his head at that moment of
page 273 } time?

A. Yes, sir.

Q. Where was he looking?

A. He had his head down with a stick in his left hand, running right straight to my bus. I cut my bus to the right trying to get away from him and at the same time I hit my brakes.

Q. And what happened?

A. He hit the wheel, looked to me like in the rear view mirror; looked to me like he run right to the wheel of it and I stopped the bus, I got out, run around the bus, run around, come back in a little bit and the little boy was trying to raise his head. I grabbed his head in my hand, put this one over his eyes so he couldn't see his legs. There was another fellow, I didn't know him at the time, he came over there and put a paper blanket over him and administered first aid.

Q. Now, when you first saw the little boy through your rear view mirror where was he, approximately, in relation to the street, now?

A. Well, he was approximately—when I saw the little boy, the first time I saw him, he was approximately five—four or five feet across the line, something like that.

The Court: Across what?

The Witness: Where he run into me.

page 274 } By Mr. Ferrell:

Q. But I want to get in relation to the center line of the street, where was the little boy; the center of the street, approximately, which side of the center of the street was he?

A. Well, he was probably—

Q. Or maybe he was on it, you tell me.

A. He was approximately right at the center, approximately, maybe, a foot on the side from me.

Q. On the side from you would be on the west side?

A. West side of the white line.

Q. About the center of the street, maybe a foot on the west side?

A. Yes, sir.

Harold J. Iddings.

Mr. Ferrell: Your witness. No, wait a minute.

By Mr. Ferrell:

Q. Did you see a golf ball?

A. No, sir.

Q. Did you ever see a golf ball at that place?

A. No, sir.

Q. On that day?

A. No, sir.

Q. As you approached that intersection and before you entered it and crossed it or any time before you
page 275 } passed that point did you see a child run from the east side to the west side?

A. No, sir.

Q. Did you see any children; that is, other than the teenagers you previously mentioned, on the west side?

A. No, sir, I did not.

Q. On the east side?

A. No, sir, I did not.

Q. All right.

CROSS EXAMINATION.

By Mr. Rosner:

Q. You saw the cars?

A. I saw the cars.

Q. Did you see a car hit a golf ball?

A. No, sir, I did not.

Q. Did you see a golf ball before the car hit it?

A. No, sir, I did not.

Q. Were you looking straight ahead?

A. Yes, sir.

Q. Did Mr. Hepler's bus stop?

A. It stopped, yes, sir.

Q. How far did he stop from the corner?
page 276 } A. Well, I can't truthfully answer that.

Q. Did he stop before he normally stops in the bus stop or did he stop where he normally should stop in the bus stop?

A. It was a little short of the regular normal bus stop.

Q. Now, could you look at this plat, Mr. Iddings? This is a plat of Lafayette Street and Cutshaw Avenue, and it goes a block in each direction on Lafayette. You were headed north on Lafayette Street, you were coming this way on the plat.

Harold J. Iddings.

(Indicating) Point out on the plat where you had your speed reduced to five miles an hour.

A. Where I had reduced the speed?

Q. Point out where you were traveling five miles an hour.

A. Right through here. (Indicating map.)

Q. At that point you were traveling five miles an hour? Did you pick up speed after that?

A. Yes, sir, it was clear, I picked up speed.

Q. To what speed did you pick up?

A. Approximately fifteen miles an hour.

Q. So you were going between five miles *and* hour and fifteen miles an hour? Put a mark on the plat where you were at five miles an hour.

page 277 } Mr. Ferrell: I will have to object to that without his knowing the scale and how many feet down from the intersection. He is not qualified to mark up the plat that way.

Mr. Rosner: Everybody else has up until now.

Mr. Ferrell: You gave them the ruler, too, the only one I didn't object to and she said then it showed her testimony was wrong.

By Mr. Rosner:

Q. All right, Mr. Iddings, this is a scale, each one of these little lines is a foot; where it is one it is ten feet; this scale is drawn one inch to ten feet. Use that scale and can you mark on the plat?

A. I am not used to this kind of doings.

Q. How many feet were you from the intersection when you slowed down to five miles an hour?

A. Approximately thirty to thirty-five feet.

Mr. Ferrell: I don't know whether I should object to Mr. Rosner marking or not because he hasn't qualified as an expert in this field.

By Mr. Rosner:

Q. Would it be about this point where I am pointing?

Mr. Ferrell: I object.

page 278 } The Court: I don't know, "thirty or thirty-five feet." I guess we will have to stick with it.

Harold J. Iddings.

By Mr. Rosner:

Q. And at that point you were traveling five miles an hour?

A. Approximately five miles an hour.

Q. From what speed did you slow down to five miles an hour? How fast were you going before you slowed down to five miles an hour?

A. Well, approximately fifteen miles an hour, something like that.

Q. All right, so you are going about fifteen miles an hour along Lafayette Street between Grace and Cutshaw, you slowed down to approximately five miles an hour when you got about thirty-five feet from the corner. Did you see that little boy running across the street from east to the west?

A. No, sir, I did not.

Q. Did you see another little boy on the east side of the street?

A. No, sir.

Q. Where was the front of your bus in relation to Mr. Hepler's bus when you heard the gravel? How far away were you from Mr. Hepler's bus, from the front of his bus when you heard the gravel?

page 279 } A. You mean the front end of my bus to the front end of his bus?

Q. Yes.

A. I was approximately four foot like this. (Indicating.)

Q. You were past him four feet?

A. Something like that, approximately. I didn't measure it, I don't know. I'd say approximately four feet.

Q. Where were you looking as you were traveling five miles an hour and then picking up to fifteen miles an hour? Were you counting transfers or change?

A. No, sir, I were not. There was a car coming across the intersection.

Q. No car cut in front of you?

A. You don't know what they might do right there.

Q. Did any car cut in front of you?

A. No, sir, but I was expecting it. I had to be expecting the impossible.

Q. And you had your eyes on the car?

A. No, sir, when that car came this way he passed me; the other one—one came out here and made a right turn on Cutshaw. When I seen that was clear, everything else was

Harold J. Iddings.

normal, I seen the high school girls standing on the corner waiting for the other bus.

page 280 } Q. You kept your eye on the car that made the right turn until he made that turn and you saw it was clear?

A. No, sir, when he started making his turn I looked at the bus stop. The high school girls was in the bus stop and the bus was coming in to make his stop.

Q. So you were looking right at where the little boy was standing?

A. I don't know where the little boy was standing, mister.

Q. If he was standing there with the girls, you would have been looking right at him?

Mr. Ferrell: I object to that.

Q. You were looking at the three girls?

Mr. Ferrell: There is no testimony he was standing there with the girls.

The Court: He is trying to find out where he was looking.

By Mr. Rosner:

Q. You were looking at the three girls and you also had your eye on the on-coming bus?

A. No, sir.

Q. Isn't that what you said?

A. No, sir, I said I looked at the girls and then I looked back, the on-coming bus.

page 281 } Q. You looked at the girls and then you looked at the on-coming bus?

A. Yes, sir, I didn't keep my eyes in one place all the time.

Q. That's right, and then where did you look?

A. I looked back at the road. I couldn't drive down there with my eyes off the road.

Q. Now which car made the right turn, the first car or the second car?

A. The second car.

Q. Where were you when the second car made the right turn?

A. Approximately about the center of the—

Q. Approximately the center of the intersection?

A. Yes, sir.

Harold J. Iddings.

Q. The front of your bus?

A. Yes, sir.

Q. Then the way was clear, there was nothing else there in front of you except the on-coming bus?

A. Yes, sir.

Q. From the time that the front of your bus was at the center of Cutshaw Avenue, is that correct?

A. That is correct, sir.

Q. Did you hear the girls scream?

page 282 } A. No, sir, I did not.

Q. You heard no scream?

A. I heard no scream.

Q. And how old are you now?

A. Forty-seven.

Q. And at the time of the accident, either forty-five or forty-six?

A. Forty-five.

Mr. Rosner: I have no further questions.

Mr. Ferrell: I have no further questions.

By the Court:

Q. When the front of your bus was in the middle of the intersection, had you seen the other bus?

A. Yes, sir, I had.

Q. Where was the front of his bus at that time?

A. Well, he was down the street.

Q. About how far would you say?

A. He was somewhat, Judge, about the middle of the block, to the best of my recollection.

The Court: All right.

By Mr. Rosner:

Q. And your testimony is that the first that you saw of this boy was through your rear view mirror when he was running and where did he come in contact with your bus,
page 283 } did you say, through the rear view mirror?

A. Right at the wheels.

Q. Rear wheel?

A. Rear wheels on the left-hand side.

Q. That is where you saw him for the first time?

A. Yes, sir.

Mr. Rosner: That is all.

John D. Leonard.

By Mr. Ferrell:

Q. Had your bus turned to its right before the boy came in contact with it?

A. Yes, sir, I turned it before, tried to dodge the boy.

Q. Had your brakes taken hold, now, before the boy came in contact with the bus?

A. Well, I can't truthfully answer yes or no, it was so quick that when I turned I hit my brakes.

Mr. Ferrell: That's all.

(The witness stood aside.)

* * * * *

page 300 }

* * * * *

JOHN D. LEONARD,

being previously sworn, was recalled to the stand in behalf of the Defendant, and testified as follows:

Mr. Ferrell: Before you get on the stand, Mr. Leonard, I would like for you to examine this plat on the board and call your attention to the rear of 3924, isn't it, Cutshaw. Is that the place?

The Witness: Right here? (Indicating) Yes, page 301 } sir.

Mr. Ferrell: Now, take the stand.

DIRECT EXAMINATION.

By Mr. Ferrell:

Q. Did you go to the rear and take a picture on the other side of the chain link fence that is shown on that exhibit at the point that was shown you by Mrs. Turner, the lady who just testified?

A. Yes, sir.

Q. Is this the picture that you took?

A. That is the picture.

Q. Does this correctly portray the scene that you see there?

A. Yes, sir.

John D. Leonard.

Mr. Ferrell: We request that that be introduced in evidence.

Mr. Rosner: I object to it. I don't see where it is relevant.

Mr. Ferrell: It is where the children were playing when Mrs. Turner last saw them and where little Schain himself said he was playing when he threw the ball.

Mr. Rosner: It has nothing to do with the accident.

Mr. Ferrell: Also shown on this plat.

page 302 } Mr. Rosner: I except to it. The only possible relevancy it could have would be whether or not the picture could have any effect on the view of a driver. However, this is not any place near the scene and I feel the jury might possibly become confused. I don't think it has any business in evidence.

The Court: I will just have to ask counsel. I don't remember, is this the area the little boy said he was playing in prior to the time that he threw a ball somewhere?

Mr. Ferrell: Yes, sir.

The Court: I have forgotten the evidence myself.

Mr. Rosner: Well, the evidence of the two girls—

The Court: I am talking about the little Schain boy when he was on the stand. He talked about where he and the Turner boy were playing ball. Is this the area?

Mr. Rosner: Yes, sir.

The Court: I will let it in.

(The said photograph was marked and filed as Defendant's Exhibit No. 9.)

By Mr. Ferrell:

Q. Mr. Leonard, did you take that picture?

A. Yes, sir.

page 303 } Q. What does it show? Where were you standing when you took that picture?

A. I was standing in the middle, approximately in the center of Lafayette Street looking south.

The Court: At what place was the camera, up or down Lafayette?

A. I was north of Cutshaw looking south.

By Mr. Ferrell:

Q. And over on the righthand side of the picture there

John D. Leonard.

appears to be a bus stop. Is this the bus stop that has been talked about so much in evidence in this case?

A. Yes, sir.

Q. Where the three teenagers were standing and where the plaintiff was at one time?

A. Yes, sir.

Mr. Ferrell: We ask that this be received in evidence and marked as Defendant's Exhibit No. 10.

Mr. Rosner: I ask that it be marked, the direction, Your Honor, that this picture was taken from.

Mr. Ferrell: It says Lafayette Street and Cutshaw looking south, taken 7/21/62 by John D. Leonard.

The Court: The camera here is facing south?

A. Yes, sir.

page 304 } (The said photograph was marked and filed as
Defendant's Exhibit No. 10.)

Mr. Rosner: I would like to know how far away he was from the intersection that is in the picture. Pictures can sometimes be misleading.

Mr. Ferrell: We will get it measured. Will you do the same thing on your pictures looking the other way?

Mr. Rosner: Ours are measured.

The Court: Let me ask Mr. Leonard, is this bus stop sign here also indicated on the plaintiff's exhibit No. 1, the large chart?

A. Yes, sir, that is this sign here (indicating) and then there is another one here and another one here.

The Court: Well, what is the distance? Where you have your finger, what is the distance of that sign from the corner? Is it shown on there or do we have to measure it?

Mr. Rosner: You would have to measure it.

The Witness: It would have to be measured.

Mr. Ferrell: I had it measured by the first witness and he said 71 feet from the north curb line to the "No Parking—Bus Stop" sign.

The Court: I think that clarifies part of the
page 305 } distance.

John D. Leonard.

By Mr. Rosner:

Q. Do you know how far you were back from the intersection when you took the picture?

A. No, I just went back far enough to get the area I wanted it to show in.

The Court: Were you back as far as the alley?

A. Approximately the alley, yes, sir, right along in here. (Indicating map.)

Mr. Rosner: All right.

Mr. Ferrell: I have no further questions.

(The witness stood aside.)

Mr. Ferrell: The Defendant rests, Your Honor.

The Court: All right. Is there any rebuttal evidence?

Mr. Rosner: Your Honor, I think I have one rebuttal witness but I don't have the witness here.

The Court: We will reconvene tomorrow morning at 10:00 o'clock and I will see counsel before we leave this afternoon.

• • • • •

page 308 }

• • • • •

The Court: Counsel and gentlemen of the jury, one of the witnesses who was unable to be here at the beginning of the trial on account of some illness, Mary Lee Chalkley, the doctors have permitted her to attend court this morning and, consequently, I will say that the plaintiff may reopen his case if he so desires, and call Miss Chalkley. If he does not, the defendant may call her. I told her she would be used immediately so she could return home.

Mr. Rosner: If Your Honor please, the plaintiff would like to call Miss Chalkley to the stand at this time.

MARY LEE CHALKLEY,

being first duly sworn in behalf of the plaintiff, testified as follows:

DIRECT EXAMINATION.

By Mr. Rosner:

Q. Please tell us your name.

page 309 } A. Mary Lee Chalkley.

Q. And how old are you now, Mary?

A. Eighteen.

Q. How old were you on June 7, 1960, when this accident occurred?

A. Sixteen.

Q. Do you remember the events of this accident?

A. Yes.

Q. Where were you standing when the accident occurred and who were you with?

A. I was with Betty Richardson and Lucy Boettcher and I was between them.

Q. And approximately where were you standing, what side of the street and what was the name of the street that you were standing on?

A. I was standing on Lafayette on the side that the school was on.

Q. Could you look at this plat over here and point out on the plat approximately where you were standing? The street running across the plat is Lafayette Street; north is the way I am pointing now; north is towards Augusta Avenue; south is up Grace; the school is up Cutshaw Avenue and there is a bus stop on what would be the northwest corner.

page 310 } Could you point out on the plat approximately where you were with the other two girls? You may get up and walk over to the plat.

A. Right here. (Indicating map.)

Q. Did you see Louis, the boy who was injured, before the accident?

A. Yes.

Q. Where was he when you saw him?

A. On the other side.

Q. Could you point on the plat approximately where he was when you saw him?

A. Somewhere around in here. (Indicating map.)

Mr. Rosner: Let the record show that the witness pointed to the area south of the apartment house on the—

Mr. Ferrell: 3924; it is not so marked on that map.

Mary Lee Chalkley.

Mr. Rosner: It would be the apartment house on the north-east corner of the intersection.

Mr. Ferrell: In the area between the front walk and the side of that house, the west side, is that correct?

Mr. Rosner: Let the witness go over to the plat and make a mark, the general area.

The Court: Suppose you mark it with the page 311 } letter "S" standing for Schain.

The Witness: The area where he was?

Mr. Rosner: Yes, just circle the area and put an "S" in the middle of it, where he was when you first saw him.

(The witness so marked the map.)

Mr. Rosner: Put a little "S" in there and put your initials "M.L.C." Thank you.

By Mr. Rosner:

Q. Was anyone with Louis?

A. Yes.

Q. Do you know the name of the person who was with him?

A. No, I don't.

Q. Describe him. Was he an adult or a child?

A. A small boy.

Q. What were they doing?

A. They were playing.

Q. Were they making any noises? Did you hear?

A. I don't know.

Q. Then what did Louis do?

A. He ran across the street to our side.

Q. And where did he run to?

A. Just—is that north? (Indicating)

page 312 } Q. Yes.

A. Just north of us.

Q. Just north of where you all were? And then what did he do? Did anything happen as he was crossing the street?

A. He dropped the ball.

Q. What kind of ball?

A. A golf ball.

Q. Did you see the ball?

A. Yes.

Q. Did you have any trouble seeing it?

A. No.

Q. What color was it?

Mary Lee Chalkley.

A. White.

Q. Where was he when he dropped the ball?

A. About the middle of the street.

Q. What happened?

A. When he came to the curb where we were standing we told him he had dropped the ball. He came back to get it and a car was coming. We told him to stop and wait. When he reached the side where we were we told him that he had dropped his ball and he started back across the street to get it and we saw that a car was coming so we told him to stop and wait for the car to pass.

page 313 } Q. Did he stop and wait for the car to pass?

A. Yes, sir.

Q. Then what happened?

A. Then he went back to get it.

Q. How much time went by from the time he first ran across the street until the time that he was hit by the bus?

A. I have no idea.

Q. Was it a long time or a short time?

Mr. Ferrell: She said she has no idea.

By Mr. Rosner:

Q. All right, you have no idea at all?

A. No, I don't.

Q. What part of the bus did he come in contact with?

A. The side.

Q. Where on the side?

A. Just behind the front wheel.

Q. You have no question about that in your mind?

A. No, I don't.

Mr. Rosner: Answer Mr. Ferrell's questions.

page 314 } CROSS EXAMINATION.

By Mr. Ferrell:

Q. Mary Lee, you were born on February 25, 1944?

A. Right.

Q. Where were the southbound car or cars that were coming down the street that you saw and told this little boy, who turned out to be Louis Schain, to wait for? Where were they? I understand they were southbound, but where were they up the street or in the street from you?

A. About the alley, this gravel alley.

Mary Lee Chalkley.

Q. About the alley?

A. This side of it, maybe. (Indicating)

Mr. Ferrell: Let the record show that the cars were about the alley at the corner of the northwest corner of Cutshaw and Lafayette.

Mr. Rosner: Did she say she was sure or not?

A. I said about the alley, I wasn't sure whether it was this side or not, or other side.

By Mr. Ferrell:

Q. You don't know whether it was to the north side, or the center line of the alley, but it was in the neighborhood of the alley, to the north of you; the first alley?

A. Yes.

page 315 } Q. How many automobiles were there?

A. I know there was at least one but there may have been more.

Q. There was at least one?

A. Yes, sir.

Q. And may have been more, coming south? And the little boy waited until those automobiles went by?

A. Yes.

Q. Did you notice whether any of the automobiles hit the golf ball?

A. The first one.

Q. The first one struck the golf ball? And what happened to it?

A. It rolled into the gutter on the other side of the street.

Q. Now after these autos or auto had passed, I believe you said that the young boy ran out into the street?

A. Yes.

Q. Which direction, now, did he run across, attempt to run?

A. North.

Q. He ran north?

A. Yes.

page 316 } Q. Did he run straight down the street north?

We are assuming that Lafayette Street runs north and south.

A. He ran diagonally.

Q. He ran diagonally?

Mary Lee Chalkley.

Mr. Rosner: May I ask that the witness be allowed to go to the plat and point it out?

Mr. Ferrell: Yes.

A. More or less in this sort of direction. (Indicating map.)

By Mr. Ferrell:

Q. And ran diagonally?

Mr. Ferrell: May the record show she indicated a north-eastwardly direction, assuming that Lafayette Street is north and south.

By Mr. Ferrell:

Q. Now when he started out into the street where was the rear of the southbound automobile or the last vehicle that went by?

A. He ran out right behind it.

Q. How many feet would you say he was behind it when he ran out?

A. Two or three.

Q. Well, now, did you see a southbound bus coming towards your bus stop?

page 317 } A. Yes.

Q. At about that time?

A. Yes.

Q. How far away was the bus, the southbound bus, now, from the little boy as he started out from the curb?

By the Court:

Q. I would like to ask you, before you answer that question; when you all warned him not to go out into the street on account of this car or cars that were coming, where did he stop?

A. On the curb, up on the curb, not in the street.

Q. Up on the curb? All right.

By Mr. Ferrell:

Q. Getting back to that, you remember that telephone pole there?

A. Yes.

Q. Do you remember the tree?

A. Yes.

Q. Where was he standing in relation to those objects?

A. Between the tree and the telephone pole.

Mary Lee Chalkley.

Q. Between the tree and the telephone pole, in the bus stop with you folks?

A. He was further away from us, we couldn't
page 318 } touch him from where we were standing.

Q. But that bus stop goes some distance north?

A. Yes.

Q. That was what I was trying to locate. Was he on the sidewalk?

A. There is no sidewalk there.

Q. Well, the sidewalk area?

A. He was on the gravel, yes.

Q. He wasn't actually standing on the curbstone itself?

A. He was in that general area.

Q. That general coping?

A. His feet weren't over the edge of the curb, he wasn't that close.

Q. Well, now, let's get back to the southbound bus coming into there and how far away from the boy, now, if you know, was the bus coming into the bus stop when he ran out from the curb?

A. Well, I am not sure how far away he was but at first I thought it might hit him, then I felt definitely it wouldn't, that he missed him entirely.

Q. What did the bus do?

A. It stopped.

Q. How far did it move before it stopped, ap-
page 319 } proximately?

A. I don't know.

Q. Well, how far did it miss the boy?

A. Oh, gee, he was in the middle of the street before it had stopped.

Q. He was in the middle of the street before the other bus stopped? Looking northwardly, now, from you, how far was the bus from the little boy when he was in the middle of the street; how far north of him?

A. I don't know.

Q. Well, now, when he ran out into the street you looked up in the direction he was running?

A. Yes.

Q. Did you watch the little boy to see if his head was up and he was looking where he was going?

A. He was looking at the street.

Q. He was looking down at the street?

A. Yes.

Mary Lee Chalkley.

Q. And how was he running? Was he loping, skipping or just walking at a slow gait, or was he running fast?

A. Fast.

Q. He was running fast?

A. Yes.

page 320 } Q. With his head down?

A. Yes.

Q. Didn't he have some sticks in his hand?

A. I am not sure at this time whether he had or not.

Q. Well, now, as you watched the little boy as he ran out and as the southbound bus came to a stop, did you see the northbound bus?

A. Could you repeat that?

Q. As the little boy ran out into the street and the southbound bus came to a stop and you watched the little boy run ahead, did you see the bus?

A. Yes.

Q. Before the little boy ran into the side of it?

A. Yes.

Q. Where was the bus located at that moment, just before he ran into it and as he went out?

A. It had crossed Cutshaw.

Mr. Rosner: Just a minute.

The Court: It is a little confusing, Ralph.

Mr. Ferrell: I will straighten it out. Strike it.

The Court: Place the boy first.

Mr. Ferrell: She has located the boy as going
page 321 } in a diagonal direction across the street.

The Court: That takes time to do that. Let's get him at some particular spot.

By Mr. Ferrell:

Q. You saw him in the middle of the street running with his head down?

A. Yes.

Q. Did you see the northbound bus at that instant of time?

A. He was in front of it, on the side of it; the bus had passed him and he was running right into it.

Q. Well, now, what part of the bus was he next to on the side? This is before the collision.

A. He was approximately at the front of the front wheel.

Q. Front of the front wheel? Did he hold up, stand still?

A. No.

Mary Lee Chalkley.

Q. If he had stopped at that point would there have been a collision?

A. I don't know.

Q. How far away from the bus at that particular split second; from the northbound bus, now?

A. He was awfully close; I am not too sure
page 322 } how far away.

Mr. Ferrell: Well, I would like to have a picture here of the bus. I have run out of those.

Mr. Rosner: I have one here.

By Mr. Ferrell:

Q. This picture has already been put in evidence, Mary Lee, and I want you to take this pen and put an "X" mark at approximately the location on the side of the bus where the little boy came in contact with it.

(The witness so marked the photograph.)

Q. Now put a ring around it and write your name, please.
(The witness so marked the photograph.)

Mr. Ferrell: If Your Honor please. we offer this in evidence as Defendant's Exhibit No. 11.

(The said photograph was marked and filed as Defendant's Exhibit No. 11.)

By Mr. Ferrell:

Q. Is it fair to say, Mary Lee, that you were paying more attention to the southbound bus than to the northbound bus, or did you pay equal attention?

The Court: What time?

Q. Before the collision actually occurred?

By Mr. Ferrell:

A. What time before?

page 323 } Q. After the little boy ran out in the street
and before the collision occurred?

A. The southbound is that way, right? (Indicating.)

Q. Ma'am?

A. Did you say the southbound is this way?

Q. The one that was coming in your bus stop.

Mary Lee Chalkley.

A. No, the northbound.

Q. You were paying more attention to the northbound?

A. After he passed the southbound and was out into the street—

Q. I mean before, though, he passed out of the path of the southbound bus, you were watching that bus first?

A. Yes.

Q. And then you looked to the northbound bus after he got out into the street, approximately into the middle of the street?

A. Yes, sir.

Q. So the northbound bus was on the other side of the middle of the street, going north?

A. Yes.

Q. Isn't it fair to say that those two buses, the southbound bus and the northbound bus, were meeting each other in the street at a point north of where you were standing?

A. Yes.

Q. To your left? And the little boy, at that particular moment of time, was approximately in the middle of the street?

A. Yes.

Q. Running with his head down?

A. Yes.

Q. Now, while he was running in the street and when he was approximately in the middle, did you yell to him?

A. I don't remember.

Q. Now what happened to the little boy when he collided with the side of the bus, as you have indicated previously?

A. Well, he was thrown out and then the next thing I knew, he was under the back wheel and was dragged.

Q. He was thrown out? You mean up?

A. Well, I am not sure whether it was up, but I know he bounced off of the bus.

Q. Bounced off of the bus, and the next thing you knew he was under the rear wheel?

A. Yes.

Q. Could you observe the rear wheel as to whether or not the brakes had been put on?

A. It was locked.

Q. And the wheels were stationary?

A. The wheels were locked.

Q. Was it locked before it came in contact with the little boy?

Mary Lee Chalkley.

A. Yes.

A Juror: What was the answer to that?

The Witness: Yes.

By Mr. Ferrell:

Q. And what part of the little boy did the locked wheel—the left rear wheel, now, of the bus, come in contact with the little boy?

A. His leg.

Q. Which leg?

A. The left one, I believe.

Q. After the left rear wheel came in contact with the boy's leg, how far did the northbound bus go before it came to a standstill, approximately, of course?

A. About from here to the end of that table.

Mr. Ferrell: She pointed to the Judge's bench.

A. (Continuing) Not this end of the table, but the far end.

The Court: The far side?

page 326 } Mr. Ferrell: Do you have that one, Your Honor, from the end of your bench?

The Court: Nine feet.

By Mr. Ferrell:

Q. Did you observe the little boy after everything came to a standstill?

A. Yes.

Q. Did he attempt to get up?

A. He did.

Q. And then what did he do?

A. He walked—seemed like he walked, to me, to the middle of the street and then he fell.

Q. And did he say anything at that moment of time?

A. No.

Q. Or shortly thereafter?

A. Yes.

Q. What did he say?

A. He said, "What happened to my leg?"

Mr. Ferrell: I have no further questions.

Mary Lee Chalkley.

RE-DIRECT EXAMINATION.

By Mr. Rosner:

page 327 } Q. Did you hear Lucy Boettcher scream?
A. She and I both yelled.

Q. You remember yelling now?

A. Yes.

Q. At what point of time did you yell? In other words, what I want to find out is, we know the boy was running out into the street and he came in contact with the bus. In relation to him coming in contact with the bus, when did you and Lucy scream, before, after, or at the same time?

A. Well, before, I think; I am not sure.

Q. You are not sure?

A. No.

Q. Did the bus hit its brakes at any time? Did the bus start coming to a stop at any time?

Mr. Ferrell: Which bus are we talking about?

Mr. Rosner: Talking about the northbound bus, the bus he came in contact with.

By Mr. Rosner:

Q. The bus stopped, is that correct?

A. Yes.

Q. When did he start stopping?

A. I don't know.

Mr. Rosner: I have no further questions.

(Witness excused.)

page 328 } The Court: Now, in view of the fact that the plaintiff has reopened, we will treat the plaintiff's case as rested again and the defendant wants to reopen.

Mr. Ferrell: The defendant hasn't renewed its motion previously made.

The Court: I mean the evidence.

Mr. Ferrell: My case without waiving the motion, Your Honor?

The Court: Stipulating the matter about Mr. Fleet?

Mr. Ferrell: I want to make that statement now and refer to this plat.

James E. Huband.

It is stipulated that Mr. Charles H. Fleet, who prepared this plat which has been put in evidence as Defendant's Exhibit No. 1 on which are superimposed the location of various and sundry physical things that the police officer found in the street, would testify that although the plat is dated October 10, 1960, that he knows of his own personal knowledge that what is shown on this plat as of that day existed on June 7, 1960.

The Court: Ralph, I take it that you mean other than the superimposed things?
page 329 } Mr. Ferrell: Yes, that is shown on the original plat. I have a plat here without the superimposed but as much that has been put in evidence, and this is important. We refrained from cluttering up the evidence.

The Court: Is that the balance of the defendant's evidence, subject to your argument in chambers? There are two motions you want to argue. We will take rebuttal evidence.

JAMES E. HUBAND,
being called in rebuttal in behalf of the Plaintiff, testified as follows:

DIRECT EXAMINATION.

By Mr. Rosner:

Q. Mr. Huband, you have testified before. Give your name and occupation again, please.

A. James E. Huband, Jr., self-employed as a private investigator.

Q. Were you called upon by me to interview a Miss Sally Kincannon?

A. Yes, sir.

Q. When was this interview made?
page 330 } A. September 12 of 1961.

Q. At what time?

A. Approximately 4:00 p.m., sir.

Q. And where did you interview her and in whose presence?

A. At her home in her mother's presence.

Q. Did you ask her any questions relating to when she first saw Louis leave the curb, where she was in relation to Louis?

A. Yes, sir, she was on the southbound bus. She said when she first saw him she was a block or a half a block away.

James E. Huband.

Mr. Rosner: Thank you. Answer any questions Mr. Ferrell has.

CROSS EXAMINATION.

By Mr. Ferrell:

Q. Mr. Huband, when were you employed to investigate this case?

A. Shortly after the accident happened, sir.

Q. How shortly?

A. I don't recall the first day, sir.

Q. Did you take these pictures of the plaintiff, young Schain, in the hospital that have been put in evidence in this case, these two here?

page 331 } A. Yes, sir. I did.

Q. When were those taken?

A. This one here with the bandage—

Q. Refer to the exhibit number on the back.

A. Excuse me, plaintiff's exhibit No. 5 was taken on June 10, 1960.

Q. So you had been employed before the 10th?

A. Yes, sir.

Q. When was the next one taken?

A. The next one was taken on June 21.

Q. And the third one?

A. These two exhibits, 6 and 7, were taken the same day, sir.

Q. Now, what was your compensation?

Mr. Rosner: I object to that.

The Court: Objection sustained.

By Mr. Ferrell:

Q. I mean for interviewing Sally Kincannon.

Mr. Rosner: I object.

The Court: Objection sustained. You may ask him was he compensated?

By Mr. Ferrell:

Q. Were you compensated for that?

page 332 } A. Yes, sir.

Q. Was it a fixed fee or contingent?

The Court: Objection sustained.

James E. Huband.

By Mr. Ferrell:

Q. Did you follow the procedure in interviewing her that you had of the three girls on the corner and showing them those pictures of the little boy in the hospital before you interviewed them?

A. No, sir, I don't recall showing Miss Kincannon any pictures.

Q. And you jotted down your version of what she had told you, is that correct?

A. Yes, sir.

Q. And by looking at that, you refreshed your memory as to what she told you?

A. Yes, sir.

Q. You didn't have a distinct recollection of your own before looking at her statement?

A. Not as vividly as I would if I had refreshed my memory, sir.

Q. And you were asked to refresh your memory by looking over her statement before you got on the stand today?

A. I was told that I would be called on to testify and I automatically referred to my notes.

Q. Well, did you know it was as to Sally Kincannon or maybe some of these other witnesses you interviewed?

A. I knew it was Sally Kincannon.

Q. Not Bill Cooley?

A. No, sir, Sally.

Q. You had interviewed him, too?

A. Yes, sir.

Q. And Mr. Cox?

A. Yes, sir.

Mr. Ferrell: I have no further questions.

RE-DIRECT EXAMINATION.

By Mr. Rosner:

Q. How many different people do you do investigation work for, Mr. Huband?

A. My records for last year showed that I was employed by forty-five various lawyers.

Q. And this is your livelihood, is that correct?

A. Yes, sir.

Q. Have you ever done any work for any large companies like the bus company?

James E. Huband.

Mr. Ferrell: I will have to object to that. That page 334 } hasn't any relevancy.

By Mr. Rosner:

Q. For compensation?

The Court: I think we are getting into a delicate field. He has testified what the extent of it is.

Mr. Rosner: That is all.

(Witness excused.)

The Court: Is there any other evidence?

Mr. Rosner: No other evidence, Your Honor.

Note: A recess was taken.

In chambers:

The Court: As I understand, we are at the stage here now where the plaintiff has reclosed his evidence and you want to renew the motion made yesterday?

Mr. Ferrell: In the light of the plaintiff's case as it stands, on the plaintiff's case, and I would like first to discuss it from that angle, as previously stated in the record, which I won't repeat now.

The Court: Except whatever evidence Chalkley page 335 } introduced?

Mr. Ferrell: The evidence, as we understand it, before Mary Lee Chalkley took the stand, and when I say evidence, I mean evidence on the plaintiff's case which, incidentally, we have had transcribed, does not show any failure to keep a proper lookout which is the gravamen of the plaintiff's case. Now that Mary Lee Chalkley has testified, the evidence is even more convincing and I think it does bear out the statement I made to the Court originally when I asked for the continuance, that Mary Lee Chalkley was an important witness and was an impressive witness and that I thought that her testimony would be more than cumulative and it is more than cumulative because we have just heard it. I have read and re-read the testimony of Betty Richardson and Lucy Boettcher, and Mary Lee Chalkley's testimony is much more complete. In fact, she puts the little boy running at a fast rate of speed just behind the last two southbound

vehicles, in front of the southbound bus. How far, she doesn't say.

(The motion was argued.)

Mr. Ferrell: Of course, they haven't alleged page 336 } any excessive speed; they haven't alleged anything about faulty brakes. There is evidence in here that he made the turn before the impact. He did everything to avoid the accident after he had looked into the rear view mirror. Of course, on the plaintiff's case there is no testimony either way on that, but, if Your Honor please, I say in all sincerity I cannot see where, on the plaintiff's evidence, there is any issue of a fact relating to negligence on the basis of which was a proximate cause of this collision and that in essence is what Judge Whittle was talking about in the Nosay case. He talked about causation in 193 Va. 343 and that is what we have. It is pure surmise and speculation and conjecture on the plaintiff's case as to any negligence on the part of this bus operator.

Now, they have gone into great detail on the injuries. I don't have to belabor that point and if there ever was a case where there was danger of the jury being unconsciously swayed to speculate or surmise, despite the instructions of the Court, as to negligence and facts of negligence, it would be this case, and it would seem to me that by all the rules that are laid down by our Supreme Court of Appeals and the rules that bind the lawyers and courts, that this page 337 } is a case that ought not to go to the jury on this testimony of the plaintiff.

(The motion was further argued.)

Mr. Ferrell: Now, I don't know whether the Court wants me to go forward with the motion. I would think that the orderly process would require action first on the motion to strike the plaintiff's evidence.

The Court: At the conclusion of the plaintiff's evidence?

Mr. Ferrell: At the conclusion of the plaintiff's evidence, and then get that done and then make my motion, if that is overruled, on the basis of all the evidence in the case which I would like to have an opportunity of doing if that is the way the Court is going to rule.

The Court: That is the way I am going to rule. At the conclusion of the plaintiff's evidence the motion to strike is overruled.

Mr. Ferrell: We respectfully except to the ruling of the Court for reasons stated at this time and previously on the similar motion before Miss Chalkley took the stand for the plaintiff.

Now, may it please the Court, the defendant, page 338 } Virginia Transit Company, moves the Court to strike all the evidence in this case, take the case away from the jury on the grounds there is no evidence in the case on which there is any issue as to the bus operator's failure to maintain a proper lookout and as a proximate cause of which the plaintiff was injured. Now, in this connection, of course, we take all of the testimony. In addition to the three girls on the corner, we have Mr. Cooley who was right far away but he gave, certainly, a statement or stated the facts as he saw them which would completely exonerate the defendant. Coming down the street, we have next Mr. Douglas Cox, I believe his name was, the passenger on the bus on the left side, three cross seats from the front, who put the buses in the act of passing and close to his seat when the collision occurred, which shows that the boy came out into the street to the rear of the bus operator, and then we have Miss Sally Kincannon whom they have tried to impeach, who made a very good witness. I think that is the reason they tried to impeach her, and she says some very interesting things.

(The motion was argued.)

page 339 } Mr. Ferrell: It does seem to me that if the Court has any question as to any factual issue on negligence which was a proximate cause, that you would review, before you rule on this motion, you review such evidence to see how it stacks up with your memory of the testimony before submitting this thing to the jury where those likelihoods that I previously pointed out are apt to happen. That is the risk to us in this case. There is no risk to us, as I see it, on the facts as to negligence and, of course, we still have the right of appeal, and that is my plea to the Court.

(Off the record.)

The Court: Let's hear your argument on the defendant's motion.

Mr. Rosner: We don't have to be concerned about contributory negligence. It is purely a question of whether there is any evidence in the case upon which reasonable men can differ as to whether the bus driver is or is not guilty of any

negligence that proximately contributed to the child's injuries. That is the point.

(The motion was argued.)

page 340 } The Court: I think I get a picture of your argument. One thing I want to ask you before I forget about it because it was mentioned a couple of times, that he should have seen the golf ball. Suppose he did or should see the golf ball, so what?

Mr. Rosner: I think any ball in the street is a danger sign.

The Court: Of what?

Mr. Rosner: Of children.

The Court: The courts held that a tricycle is not.

Mr. Rosner: Not in the street, up on the sidewalk.

The Court: Who plays with golf balls, children or adults? I think we have a problem here. I think I grasp the significance of your argument. Are there any statements you want to make in reply?

Mr. Ferrell: Your Honor, I still don't think he has pointed out anything that shows that the bus operator owed a duty to anticipate *than* an unseen child was going to come out from that position where the evidence places him after he had exercised the lookout that he testifies to, because
page 341 } that would require him to continually keep his eye on his left curb, the west curb of the street, and I know of no cases or any other authority that would indicate that he has got to look in that direction.

(The motion was further argued.)

The Court: Well, I think that a jury question is presented here on this evidence as to where the bus and the boy were at respective times. It looks to me like it is up to the jury to have to decide where the bus was when the boy left the curb and became obvious in the street and, if the bus was up at a point to see him, the bus driver would have to be looking at left angles to see him; well, that is one problem, that is the theory that the defendant is contending for. On the other hand, if he is back at a point where even looking ahead he would see the object coming from the left, why, that is the plaintiff's theory and I think the jury could decide it either way. So, I overrule the motion and let it go to the jury.

Mr. Ferrell: We object and except for the reasons stated and may the record also show that for the same reason we ob-

ject and except to the giving of instructions to
 page 342 } the jury and that we offer the instructions that
 we do offer without prejudice to the previous mo-
 tions to strike at the conclusion of the plaintiff's testimony
 and the motion to strike at the conclusion of all the testimony.

* * * * *

page 343 }

* * * * *

OBJECTIONS AND EXCEPTIONS TO INSTRUCTIONS.

Mr. Rosner: The plaintiff, by counsel, objects and excepts to the refusal of the Court to grant Plaintiff's Instruction A. The only objection that is being made is to No. 4 in Plaintiff's Instruction A which involves the giving of audible warning with the horn. The objection is to that part of Instruction A not being included in the Plaintiff's Instruction No. 8 which was given by the Court.

INSTRUCTION A, AMENDED AND GIVEN AS INSTRUCTION NO. 8, READS AS FOLLOWS:

The Court instructs the jury that at the time
 page 344 } and place of the collision involved herein, it was
 the duty of the defendant to exercise reasonable
 care:

1. To keep his vehicle under proper control;
2. To keep a proper lookout;
3. To use his brakes if practicable in an effort to avoid a collision, if possible;
4. To give audible warning with his horn, if possible, in an effort to warn a pedestrian of his position of danger.

And, if the jury believe from the evidence that the defendant failed to exercise reasonable care in the performance of any one or more of the foregoing duties, then he was negligent; and if you further believe from the evidence that any such negligence was a proximate cause of the collision, then you shall find your verdict for the plaintiff.

Mr. Rosner: The plaintiff objects and excepts to the refusal of the Court to instruct the jury under Instruction No. B that the sole beneficiary of any award in this case is Louis

Schain and that such award should be held in trust for his use and benefit, especially in view of the fact that an instruction has been granted explaining to the jury that this case did not in any way involve any medical expenses.

page 345 } INSTRUCTION NO. B, REFUSED, READS AS
FOLLOWS:

The Court instructs the jury that the sole beneficiary of any award in this case is Louis Schain and such award shall be held in trust for his use and benefit.

Mr. Rosner: The plaintiff objects and excepts to the refusal of the Court to give Instruction No. C on the grounds that the defendant, by counsel, has through witnesses inferred, or tried to infer, that Louis had no business leaving his home and the jury may have the impression that this would have something to do with the case. This instruction would clarify that situation and would let the jury know that no matter how he happened to get out in the street, it does not affect the case in any way.

INSTRUCTION NO. C, REFUSED, READS AS FOLLOWS:

The Court instructs the jury that the circumstances under which Louis left his home is not an issue in this case and should not be considered in your deliberations.

Mr. Rosner: The plaintiff objects and excepts to the granting of Instruction No. 2. The objection is limited to the language "in whole or in part" in the sense a verdict must not be based in whole or in part upon conjecture, or surmise, or sympathy, *et cetera*, for the reason that this language could very well lead a jury to believe that they may have to decide every issue in the case beyond reasonable doubt; and is also confusing.

INSTRUCTION NO. 2, GRANTED, READS AS FOLLOWS:

The Court instructs the jury that you must consider this case solely upon the evidence before you and the law laid down in the instructions of the Court; and you must not allow any sympathy you may feel for any party to influence your verdict. A verdict must not be based, in whole or in part, upon conjecture, or surmise, or sympathy, but must be based

solely upon the evidence in the case and the instructions of the Court.

Mr. Rosner: The plaintiff strenuously objects to the granting of Instruction No. 12. The language "there must be more than a probability of negligence" at the beginning of the second paragraph of this Instruction is, in the opinion of counsel for the plaintiff, extremely misleading and does not state the law correctly. All that the plaintiff has to do is prove his case by a preponderance of the evidence and if the jury feel that it is more probable that a certain event occurred, or that it is more probable that the defendant was guilty
page 347 } of negligence than that he was not guilty of negligence, then they should be instructed to come in with a verdict for the plaintiff. This language to the effect that there must be more than a probability of negligence will lead the jury to believe that the plaintiff is bound to prove his case to a point beyond a reasonable doubt, which is certainly not the plaintiff's burden. The plaintiff also objects to the entire instruction on the grounds that it is argumentative and also on the ground that it is repetitious.

INSTRUCTION NO. 12, GRANTED, READS AS FOLLOWS:

The basis of this law suit is whether Harold J. Iddings, the bus operator, negligently operated the bus of the Virginia Transit Company, northbound on Lafayette Street, thereby causing the bus to collide with and injure the plaintiff, Louis Ralph Schain. And the Court instructs the jury that the mere fact that there was an accident and that, as a result thereof, the plaintiff was injured does not of itself entitle the plaintiff to recover. In order for the plaintiff to recover in this case, the burden is upon the plaintiff to prove by a preponderance of the evidence that the said Harold J. Iddings was negligent and that any such negligence was a proximate cause of the collision.

page 348 } There must be more than a probability of negligence, and if the jury are uncertain as to whether any such negligence on the part of Harold J. Iddings has been proven by a preponderance of the evidence, or if the jury believe that the conduct of Harold J. Iddings is equally consistent with the non-existence of negligence as it is with the existence of negligence, then you must find your verdict in favor of the defendant, Virginia Transit Company.

Mr. Rosner: The plaintiff objects and excepts to the granting of Instruction No. 13 on the grounds that the law stated in this Instruction, although correct as an abstract legal proposition in adult cases, is not the law in the case of an infant and is in opposition and contradicts Instructions No. 10 and No. 11 which require the operator of a motor vehicle to anticipate the heedless and unexpected acts of children of tender years.

INSTRUCTION NO. 13, GRANTED, READS AS FOLLOWS:

It is incumbent on the plaintiff not only to prove by the preponderance of the evidence that the operator of the defendant's northbound bus, Harold J. Iddings, was negligent in failing to keep a proper lookout for the plaintiff, Louis Ralph Schain, but also to prove by the preponderance of the evidence that such negligence, if any, was a proximate cause of the collision between the plaintiff and the left side of such bus, i.e., that this collision was a natural and probable consequence of any such negligence. A person is not charged with foreseeing that which could not reasonably be expected to happen, nor for casualties which, though possible, were improbable, nor for causes which could not have been reasonably foreseen. Therefore, even though you may believe from a preponderance of the evidence that Iddings was negligent in failing to keep a proper lookout for the plaintiff as Iddings drove his bus northwardly on Lafayette Street, unless you further believe from a preponderance of the evidence that such negligence, if any, was a proximate cause of the collision between the plaintiff and the left side of defendant's bus, then you must find your verdict for the defendant.

Mr. Rosner: The plaintiff objects and excepts to the granting of Instruction No. 14 on the grounds that this Instruction calls particular attention and directs the jury's attention strongly to the possibility that the plaintiff's conduct was the sole proximate cause of the accident. It is felt that Court has already instructed the jury adequately and in later instructions continues to instruct the jury as to what the legal rights of all of the parties concerned are, it is felt that this Instruction points up in too strong a manner and is repetitious of the non-liability factors of which there is evidence in this case. Furthermore, the way this Instruction is worded, it strongly calls attention to the jury, in the first part, stating there are some situations

in which there is no legal liability and then the language continues, "And in the present case, even though the plaintiff * * * was legally incapable of negligence * * * if the jury believe from the evidence * * *"

The way this instruction is worded it seems like it is almost an argument on behalf of the defendant, that the jury should be sure to notice that Louis may be the sole proximate cause of this accident.

INSTRUCTION NO. 14, GRANTED, READS AS FOLLOWS:

The Court instructs the jury that there are some situations in law where there is no legal responsibility for an accident, i. e., where the defendant is not negligent as a matter of fact and the plaintiff is incapable of negligence as a matter of law. And in the present case, even though the plaintiff, Louis Ralph Schain, was legally incapable of negligence as set forth in another Instruction of the Court, nevertheless, if the jury believe from the evidence that his conduct was the sole proximate cause of the accident, then he cannot recover.

Mr. Rosner: The plaintiff objects and excepts to the granting of Instruction No. 15 on the grounds that the following language should be added to the Instruction and plaintiff urges the Court to add the following language to the Instruction: change the period to a comma and add the words, "until the defendant's bus driver saw or should have seen Louis in or near the street." The reason that this language should be added is to make this Instruction consistent with the other Instructions given in this case and in every infant's case. There is a greater duty owed to children in or near streets when they have been observed or should have been observed, and this Instruction ignores this duty.

INSTRUCTION NO. 15, GRANTED, READS AS FOLLOWS:

The Court instructs the jury that the defendant, Virginia Transit Company, was not an insurer of the safety of the infant plaintiff, Louis Ralph Schain, and that the operator of the defendant's northbound bus, Harold J. Iddings, was not required to exercise more than ordinary care in discharging his duty of keeping a proper lookout as he was driving his bus northwardly on Lafayette Street.

Mr. Rosner: The plaintiff objects and excepts to the granting of Instruction No. 16 on the grounds that this is repetitious. This is saying the same thing about the third time already. My objection is that this has already been fully covered, I believe, several times already in the Instructions. It is like we say, "if he is not negligent, you can't recover;" "If you were negligent, you can't recover," and then you go into the act that would have made him not negligent and then the act that would have made him negligent and it is given in the affirmative and the negative, and this is in the opinion of counsel for the plaintiff repetitious and lays too much stress on the possibility of no negligence.

INSTRUCTION NO. 16, GRANTED, READS AS FOLLOWS:

The Court instructs the jury that if you believe from the evidence that the Virginia Transit Company's bus operator, Harold J. Iddings, was not negligent in his operation of the bus northwardly on Lafayette Street and that Louis Ralph Schain ran suddenly and unexpectedly across Lafayette Street between intersections in dangerous proximity to the bus and that the operator of the bus, Harold J. Iddings, in the exercise of ordinary care, could not have avoided the accident after Iddings realized or in the exercise of ordinary care should have realized the danger to Louis Ralph Schain, then you must find your verdict for the defendant.

Mr. Rosner: The plaintiff objects to the granting of Instruction No. 20, especially in view of the fact that the plaintiff's offered Instruction on who was the beneficiary of any award in this case has been refused and there is absolutely no evidence, no inferences of any kind about any medical expenses in this case and this was profusely avoided by counsel for the plaintiff and there is absolutely no evidence of any kind, no bills were ever mentioned, no amounts of money were ever mentioned, either directly or indirectly.

INSTRUCTION NO. 20, GRANTED, READS AS FOLLOWS:

The Court instructs the jury that in no event shall you take into consideration any doctors', hospital, or medical expenses, because such expenses cannot be recovered in this suit.

page 354 } Mr. Ferrell: Reserving all previous objections and exceptions taken, the defendant, Virginia Transit Company, has no objection to the Court's Instruction No. 1, which I understand to be amended and have the number 21 in there, 1 through 21.

INSTRUCTION NO. 1, GRANTED, READS AS FOLLOWS:

The Court instructs the jury that the function of the jury is to determine the facts from the evidence and to reach a proper verdict by applying thereto the law as contained in the Instructions of the Court. Instructions 1 through 22 are all of the Instructions of the Court given to the jury in this case, and you shall consider them together in arriving at your verdict.

Mr. Ferrell: We have no objection to No. 2 which is a re-write of one previously tendered by the defendant.

INSTRUCTION NO. 2, GRANTED, READS AS FOLLOWS:

The Court instructs the jury that you must consider this case solely upon the evidence before you and the law laid down in the Instructions of the Court; and you must not allow any sympathy you may feel for any party to influence your verdict. A verdict must not be based, in whole or in part, upon conjecture, or surmise, or sympathy,
page 355 } but must be based solely upon the evidence in the case and the Instructions of the Court.

Mr. Ferrell: We have no objection to the Court's Instruction No. 3 which is a re-write of an Instruction tendered by the defendant.

INSTRUCTION NO. 3, GRANTED, READS AS FOLLOWS:

The Court instructs the jury that you are the sole judges of the credibility of the witnesses and the weight to be given their testimony. In determining the weight to be given to the evidence of any witness, you may consider the appearance and demeanor of the witness on the stand; his manner of testifying; his apparent intelligence or lack of intelligence; his interest or lack of interest in the result of the case; his relationship, if any, to the parties; his bias, if such has been

shown by the evidence; his opportunity or lack of it for knowing the truth and for having observed the facts to which he testifies; any prior inconsistent statement made by such witness, if such has been shown by the evidence; and all the other surrounding circumstances appearing at the trial. From all these things you are to determine which witnesses are more worthy of credit and to give credit accordingly.

Mr. Ferrell: We have no objection to the page 356 } Court's Instruction No. 4 which is a re-write of an Instruction previously tendered by the defendant.

INSTRUCTION NO. 4, GRANTED, READS AS FOLLOWS:

The Court instructs the jury that no alleged prior statement made by a witness, which is contrary to the testimony of the witness given at the trial, can be considered by the jury as pertinent in any degree to prove any fact or circumstance contained in such prior inconsistent statement; and you may consider such alleged prior inconsistent statement only for the purpose of determining what weight, if any, to give to the testimony of the witness at the trial.

Mr. Ferrell: We do object, however, to the Court's Instruction No. 5, in that its definition of "reasonable care" is that care which a "reasonably prudent person would have exercised under the same or similar circumstances," and suggests "which a person of ordinary prudence would have exercised under the same or similar circumstances." The reason for this is that is confusing with other Instructions of the Court where we are talking about ordinary care and ordinary prudence and it is really to the form we think will be confusing to the jury as to a different terminology.

page 357 } **INSTRUCTION NO. 5, GRANTED, READS AS FOLLOWS:**

The Court instructs the jury that "negligence" is a failure to exercise reasonable care or the violation of some positive duty imposed by law.

"Reasonable care" is that care which a reasonably prudent person would have exercised under the same or similar circumstances.

A "proximate cause" of an event is a cause which, in natural and continuous sequence, unbroken by any efficient in-

tervening cause, produces the event, and without which the event would not have occurred; it is an act or omission which immediately causes or fails to cause the event; an act or omission occurring or concurring with another act, where, had it not happened, the event would not have occurred.

Mr. Ferrell: The defendant has no objection to Instruction No. 7 which is one of Judge Doubles' stock Instructions.

INSTRUCTION NO. 7, GRANTED, READS AS FOLLOWS:

The Court instructs the jury that the term "preponderance of the evidence" does not necessarily mean the greater number of witnesses, but means the greater weight of the evidence or that degree of proof which the jury finds more convincing and worthy of belief. The testimony of one witness in whom the jury has confidence may constitute a preponderance.

Mr. Ferrell: The defendant does object to the Court's Instruction No. 8 upon the grounds that this highlights and emphasizes the duty of the operator to exercise reasonable care. "1. To keep his vehicle under proper control!" and the entire case for the plaintiff as stated in his opening to the jury was merely the failure of the bus operator to keep a proper lookout and, further, that there is no evidence in the case as to failure to keep the vehicle under proper control and this is confusing to the jury and will allow them to speculate as to what is the meaning of the Instruction No. 8 with respect to the itemized first duty of the operator. It is also in conflict with other instructions that have been given or will be given by the Court as to the proper lookout, so it is inconsistent and we object both as to content and to form. In other words, it covers extraneous issues to the case and is too broad and is misleading and too abstract.

INSTRUCTION NO. 8, GRANTED, READS AS FOLLOWS:

The Court instructs the jury that at the time and place of the collision involved herein, it was the duty of Harold J. Iddings, the operator of the Virginia Transit Company's bus, to exercise reasonable care;

1. To keep his vehicle under proper control;
2. To keep a proper lookout;

And if the jury believe from the evidence that Harold J. Iddings failed to exercise reasonable care in the performance of any one or more of the foregoing duties, then he was negligent; and if you further believe from the evidence that any such negligence was a proximate cause of the collision, then you shall find your verdict in favor of the plaintiff against the defendant, Virginia Transit Company.

Mr. Ferrell: The defendant objects to the form of Instruction No. 9 for the same reasons stated as to a portion of the Court's Instruction No. 5 relating to reasonable care and we suggest that it should read, "But also the duty to see what a person of ordinary prudence exercising reasonable care would have seen under the circumstances then and there existing," and as we will point out later in the refusal of an instruction offered by the defendant as to the particulars of the duty of lookout under the circumstances involved in this case, this Instruction is too broad and too mis-
page 360 } leading, too abstract.

INSTRUCTION NO. 9, GRANTED, READS AS FOLLOWS:

The Court instructs the jury that the duty to exercise reasonable care to keep a proper lookout involves not only the duty to look but also the duty to see what a reasonably prudent person exercising reasonable care would have seen under the circumstances then and there existing; and a person who keeps a lookout but fails to take advantage of what it reasonably discloses is as negligent as one who fails to keep a lookout.

Mr. Ferrell: The defendant objects to the granting of Instruction No. 10—I might say we object strenuously—for the reasons we have previously stated in argument to the Court on motions to strike, in that there is no evidence in this case which would warrant a finding by the jury that the operator's duty was a higher duty, namely, that applicable to children when a child is actually seen or in the exercise of ordinary care should have been seen because there is no evidence in this case which tends to indicate, much less prove, that the operator of the bus was under a higher degree of care because of the presence known or should have known in the neighborhood of the scene of the accident.

page 361 } INSTRUCTION NO. 10, GRANTED, READS
AS FOLLOWS:

The Court instructs the jury that while the driver of a motor vehicle is not an insurer of the safety of children, he may encounter upon the streets or highways, nevertheless, his duty is not measured by the standards applicable to adults. The duty of reasonable care required of the driver of a motor vehicle toward children is commensurate with the danger and probability of injury under the circumstances. This degree of care is proportionate to the apparent ability of the child, in view of his age, maturity and intelligence, to foresee and avoid the perils which may be encountered, and if those perils are such as have become apparent to, or in the exercise of reasonable care should have been discovered by the motorist in the exercise of reasonable care under the circumstances. The younger the child the greater the care which is expected of the driver of the motor vehicle.

Mr. Ferrell: And in this connection, Your Honor, I would like to know whether you are going to permit them to argue under this Instruction about the golf ball. If so, of course, I would like to say the Court of Appeals has held that a tricycle
page 362 } which is a little closer to children than a golf ball
is no indication of the presence of a child.

The Court: I may interrupt counsel for the defendant and say I have already warned counsel for the plaintiff that he may not argue anything about the golf ball, failure to see the golf ball as being notice that children were in the vicinity.

Mr. Ferrell: I didn't know that.

Mr. Rosner: While we are on that subject, I would like to get it fully clarified. Now, the boy did drop the ball when he was halfway across the street; he was going back for the ball.

The Court: We don't know that.

Mr. Rosner: We don't know it, but does this mean I cannot show the consistency of certain of the witnesses' testimony and the inconsistency of others who didn't see certain things; for example, all three girls said they saw him drop the ball when he was about halfway across. They told him about the ball. It seems that up to that point it could be mentioned, but then no reference be made thereafter.

The Court: That is all right.

Mr. Rosner: It is something that happened so many times.

The Court: That is all right, that is a fact in page 363 } the case, that he dropped the golf ball, and that may be mentioned if it is absolutely necessary. I think it is immaterial.

Mr. Horwitz: Can you argue also that he failed to see an oncoming car strike an object in the street?

The Court: That who failed?

Mr. Horwitz: Iddings. Don't mention that he did not see a car strike this object in the street?

The Court: Certainly you cannot mention it. He may have been three blocks away at that time. Nobody knows where he was and there is no proof in the case to show where he was and you may not argue anything and if you do argue it, I am going to declare a mistrial. I may as well get it straight on the record that any argument that tends to show that Iddings should have seen anything about that golf ball in the street is going to be error.

Mr. Ferrell: I would like to say, still addressing myself to the Court's Instruction No. 10, that in our view this is not a *Conrad versus Taylor* situation, but it is more like the Gabbard and other cases and other authorities we cited, the

Nosay case and others, and, therefore, this hasn't page 364 } anything to do with the instant case. And, in this connection, I have one more inquiry. Are they going to be allowed to argue that because George was over in the yard of 3924 which is a house facing south on Cutshaw, that he was put on notice or should have been put on notice that there were children in the vicinity because, as Your Honor knows, there is a case that even one child, just like one swallow doesn't make a summer, doesn't give any basis for that type of an argument or that rule of law, and especially so where the duty at that particular time, the way they put it, is to a child on the opposite side of the street from where George was alleged to have been.

The Court: I don't know. What is the position of the plaintiff? Does he intend to argue that?

Mr. Rosner: We intend to show that he didn't see him, so he wasn't looking that way, you understand. I think it is very material. This whole case is hinged on where was this man looking and what was he doing to keep his bus under control. We can show he wasn't looking that way because he didn't see the boy and he was there.

page 365 } The Court: Do you intend to argue the proposition that the boy was there and should have been seen and, therefore, it was constructive notice to him that there were other children in the vicinity?

Mr. Rosner: I frankly think, Judge, that that is not enough to put him on notice.

The Court: I don't either. It is just like the golf ball theory.

Mr. Rosner: That is, as far as George Turner is concerned?

The Court: Yes.

Mr. Ferrell: We understand the same rule applies to that.

The Defendant objects and excepts to the granting of Instruction No. 11 for the same reasons as previously stated as to Instruction No. 10. This is also not the instant case. The previous rulings of the Court with respect to the golf ball and the child on the east side of the street was further evidence that the operator, Iddings, was under no duty to exercise as high a degree of care owed to children, having seen or should have seen such a child, and, further, that the evidence conclusively shows that the plaintiff was in a bus
page 366 } stop on the opposite side of the street, apparently in the line of sight of the bus operator, with the three girls waiting in the bus stop, a street sign post, a tree, called an eight inch elm tree, eight inches in diameter, and a telephone pole; therefore, there is no credible evidence in the case to show that the child was in a position where even looking directly at the child at that particular point, the bus operator could have seen him and, further, that there is no duty, considering all facts and circumstances in the case, in the operation of a bus at this particular intersection, to keep his eyes on that side of the street; that far down, at least, and especially under the circumstance where the undisputed evidence is to the effect that the southbound bus was pulling into the bus stop at the point to pick up the girls. We think that this Instruction and the other Instruction are the confused issues in the case and should not be granted for the reasons we stated in our motion.

INSTRUCTION NO. 11, GRANTED, READS AS FOLLOWS:

The Court instructs the jury that if the jury believe from the evidence that the defendant saw, or in the exercise of reasonable care should have seen, the child in
page 367 } or near the street ahead of him at or near the place where the accident occurred, that alone was notice to him of the risk and danger of the situation, and he had no right to assume that a child of tender age would remain in a place of safety, but on the contrary, was required in the

exercise of reasonable care to anticipate that the child, acting upon some childish impulse, heedless of danger and incapable of exercising precaution expected of adults, might through his thoughtlessness expose himself in some way to danger of injury, and it became the duty of the defendant to increase his vigilance as he approached the child and to exercise that degree of care that a person of reasonable prudence would have exercised under similar facts and circumstances to avoid danger of injuring the child; and if the jury believe from the evidence that the defendant violated the foregoing duty and that such violation was a proximate cause of the accident, then you shall return your verdict in favor of the plaintiff.

Mr. Ferrell: The defendant objects to the giving of Instruction No. 12 in that it omits a portion of defendant's proffered Instruction III which we have tendered to the Court, and that is the one we cut out, if Your Honor please, the particular point involved and the argumentative section of it because we thought those particular objections by the plaintiff were well taken, so what we have done there is to straighten out the title, put Harold J. Iddings' full name in the last sentence to keep it from being argumentative, say "If you believe from the evidence—" last sentence on the first page, "was the sole proximate cause—"

The Court: The Court will mark it Tendered Instruction III-A and the same is refused for the same reasons expressed by the Court in regard to the refusal of Defendant's Tendered Instruction III.

Mr. Ferrell: To be more specific, the omitted portion, I believe, in the proper Instruction put in the matter of negligence or non-negligence of the bus operator. I do believe in all fairness to the Court you covered that in another Instruction, and I believe you covered it in another Instruction, "unavoidable accident." We do think that in the form that we tendered it that it is a complete statement of all the law proffered, so to speak, relating to the proof of negligence, the plaintiff's burden of proving primary negligence on the part of Harold J. Iddings, and it properly states the relationship of Louis Schain's conduct as a cause of the accident and the relationship between that possible cause, sole proximate cause, and the problem of proof as to primary negligence on behalf of Harold J. Iddings. I think we might pause at this point and say for the reasons previously stated we object and except to the Court's refusal of defendant's proffered Instruction No. III and III-A.

INSTRUCTION NO. 12, GRANTED, READS AS FOLLOWS:

The basis of this law suit is whether Harold J. Iddings, the bus operator, negligently operated the bus of the Virginia Transit Company northbound on Lafayette Street, thereby causing the bus to collide with and injure the plaintiff, Louis Ralph Schain. And the Court instructs the jury that the mere fact that there was an accident and that as a result thereof the plaintiff was injured, does not of itself entitle the plaintiff to recover. In order for the plaintiff to recover in this case, the burden is upon the plaintiff to prove by a preponderance of the evidence that the said Harold J. Iddings was negligent and that any such negligence was a proximate cause of the collision.

There must be more than a probability of negligence, and if the jury are uncertain as to whether any such negligence on the part of Harold J. Iddings has been proven by a preponderance of the evidence, or if the jury believe
 page 370 } that the conduct of Harold J. Iddings is equally
 consistent with the non-existence of negligence as
 it is with the existence of negligence, then you must find your verdict in favor of the defendant, Virginia Transit Company.

INSTRUCTION NO. III, REFUSED, READS AS FOLLOWS:

The basis of this law suit is that Harold Iddings, the bus operator, negligently operated the Transit Company's bus northbound on Lafayette Street, thereby causing the bus to collide with and injure the plaintiff, Louis Ralph Schain. The burden of proof is on the plaintiff, Louis Ralph Schain, to show by a preponderance of the evidence that Harold J. Iddings, the Transit Company's bus operator, was guilty of negligence. The mere fact that an accident occurred raises no presumption of negligence. It is not sufficient for the plaintiff, Louis Ralph Schain, to put the matter of negligence or non-negligence of the bus operator in doubt. There must be more than a probability of negligence. And in determining the issue of negligence and non-negligence, you may find that this accident was unavoidable so far as Harold Iddings and the Transit Company were concerned, even though the plaintiff, Louis Ralph Schain, was legally incapable of negligence. The conduct of Louis Ralph Schain, although he was legally incapable of negligence on June 8, 1960, may have been the

sole proximate cause of the accident. If the con-
 page 371 } duct of Louis Ralph Schain was a proximate cause
 of the accident, the legal incapacity of Louis
 Ralph Schain to be negligent does not require you to believe
 that Harold Iddings was negligent in order to explain how
 the accident occurred. Accidents can occur without any party
 being negligent. If, upon the whole case, the conduct of Har-
 old Iddings, the Transit Company's bus operator, is equally
 consistent with the non-existence of negligence as with the
 existence of negligence, then you must find your verdict for
 the defendant, Virginia Transit Company.

INSTRUCTION NO. III-a, REFUSED READS AS FOL-
 LOWS:

The basis of this law suit is that Harold J. Iddings, the bus
 operator, negligently operated the Transit Company's bus
 northbound on Lafayette Street, thereby causing the bus to
 collide with and injure the plaintiff, Louis Ralph Schain. The
 burden of proof is on the plaintiff, Louis Ralph Schain, to
 show by a preponderance of the evidence that Harold J. Id-
 dings, the Transit Company's bus operator, was guilty of
 negligence. The mere fact that an accident occurred raises
 no presumption of negligence. It is not sufficient for the plain-
 tiff, Louis Ralph Schain, to put the matter of negligence or
 non-negligence of the bus operator in doubt. There must be
 more than a probability of negligence. And in de-
 page 372 } termining the issue of negligence and non-neglig-
 ence you may find that this accident was un-
 avoidable so far as Harold J. Iddings and the Transit
 Company were concerned, even though the plaintiff, Louis
 Ralph Schain, was legally incapable of negligence. The
 conduct of Louis Ralph Schain, although he was legally
 incapable of negligence on June 7, 1960, may have been the
 sole proximate cause of the accident. If you believe from the
 evidence that the conduct of Louis Ralph Schain was the sole
 proximate cause of the accident, the legal incapacity of Louis
 Ralph Schain to be negligent does not require you to find that
 Harold J. Iddings was negligent in order to explain how the
 accident occurred. Accidents do occur without any party be-
 ing guilty of any legal negligence. If, upon the whole case,
 the jury believes that the conduct of Harold J. Iddings, the
 Transit Company's bus operator, is equally consistent with
 the non-existence of negligence as with the existence of neg-
 ligence, then you must find your verdict for the defendant.

Mr. Ferrell: We think Instruction No. 15 is all right as far as it goes but it is still left hanging in the air, as does another Instruction about the duty to maintain a proper lookout which we attempted to spell out in one of our Instructions which the Court has denied and only object to No. page 373 } 15 for failure to do so and for the same reasons that we will state later as to the refusal of our Instruction which does spell this matter out in more detail. We think that this is so general, that is, No. 15, that is bound to just turn the jury loose and let them speculate as to what is maintenance of a proper lookout under the facts and circumstances involved in this case.

INSTRUCTION NO. 15, GRANTED, READS AS FOLLOWS:

The Court instructs the jury that the defendant, Virginia Transit Company, was not an insurer of the safety of the infant plaintiff, Louis Ralph Schain, and that the operator of the defendant's northbound bus, Harold J. Iddings, was not required to exercise more than ordinary care in discharging his duty of keeping a proper lookout as he was driving his bus northwardly on Lafayette Street.

Mr. Ferrell: We object to the Court's Instruction No. 18 which is the defendant's counter Instruction on the defense of sudden emergency and our basis for this objection is that it is too abstract in the form given to the jury.

INSTRUCTION NO. 18, GRANTED READS AS FOLLOWS:

The Court instructs the jury that in order to page 374 } rely upon the defense of sudden emergency, the party relying on such defense must himself have been free from negligence in bringing about such sudden emergency; therefore, if you believe from the evidence that there was any sudden emergency in this case but that H. J. Iddings was guilty of negligence which wholly or partially produced it, then the defendant cannot rely upon such sudden emergency as a defence.

Mr. Ferrell: The defendant objects to Instruction No. 19 in that it fails to say that these damages or items of damage which are set forth must be found by the jury, based on a preponderance of the evidence. That is missing in the first paragraph. And in the second paragraph which states, "From

those as proven by the evidence," as "those proven by a preponderance of the evident" or "which you believe from a preponderance of the evidence to have resulted from the collision." We also object and except to paragraph five of this Instruction which reads, "Any effect upon the usual activities in which he might otherwise be reasonably expected to normally engage;" because there is no evidence in this case as to his inability at the present time to engage in the usual activities of young boys. As a matter of fact, he testified that he could. Now, as to the future, what his normal page 375 } activities would be are entirely speculative and what may reasonably be expected in the future is entirely speculative. There is no direct testimony bearing upon that. As a matter of fact, they just talked about what some people do in playing football in baseball, other things of that nature, and there has been no showing that all boys engage in football and baseball, other sports of personal contact. As a matter of fact, I think you can take judicial notice of the fact that there are a lot of boys who don't, so we think paragraph No. 5 is turning the jury loose and allowing them to speculate without any real basis for even drawing any conclusions in respect to that item based on the evidence in the record.

INSTRUCTION NO. 19, GRANTED, READS AS FOLLOWS:

The Court instructs the jury that if from the evidence and the other Instructions of the Court you find your verdict in favor of the plaintiff, then in assessing the damages to which he is entitled, you may take into consideration any of the following which you believe from the evidence to have resulted from the collision:

1. Any bodily injury sustained and the extent page 376 } and duration thereof;

2. Any effect of any such injuries upon his health according to its degree and probable duration;

3. Any physical pain and mental anguish suffered by him in the past, and any which may be reasonably expected to be suffered by him in the future;

4. Any disfigurement or deformity resulting to him and any embarrassment associated therewith;

5. Any effect upon the usual activities in which he might otherwise be reasonably expected to normally engage; and from these, as proven by the evidence, your verdict should be for such sum as will fully and fairly compensate the plain-

tiff for the damages sustained by him as a result of the collision, not to exceed the sum sued for in the Motion for Judgment.

Mr. Ferrell: We object and except to the refusal of defendant's proffered Instruction I that in our view it is the law of the case, not having shown that a higher degree of care was owed to children; that the fact that the bus operator be charged with notice of the law that pedestrians shall cross wherever possible on the intersection, and then
page 377 } when they do cross the street, that they shall cross only at right angles is something he would have to have in determining whether or not he was exercising a reasonable ordinary lookout as he passed across the intersection of Cutshaw and Lafayette, and proceeded northwardly toward the intersection of Lafayette and Augusta.

INSTRUCTION NO. I, REFUSED, READS AS FOLLOWS:

The Court instructs the jury that on June 7, 1960, Code 46.1-230 provided:

"When crossing * * * streets, pedestrians shall not carelessly * * * interfere with the orderly passage of vehicles. They shall cross wherever possible only at interections. They shall cross only at right angles. * * *"

And if Louis Ralph Schain violated any of the foregoing provisions of the traffic law, then he was negligent; and if you believe from the evidence that Schain was guilty of any such negligence and that such negligence on his part was the sole proximate cause of the accident involved in this case, then you must find your verdict for the defendant.

Mr. Ferrell: The defendant objects and excepts to the Court's refusal of Instruction II for the same reason and, in addition, this does not state—or it does state that the child may be guilty of primary negligence. However, on
page 378 } the law of causation, if his negligence or conduct was the sole proximate cause of the accident then, of course, the defendant is not liable.

INSTRUCTION NO. II, REFUSED, READS AS FOLLOWS:

The Court instructs the jury that it was the duty of Louis Ralph Schain, while crossing Lafayette Street between inter-

sections, to exercise a greater degree of vigilance than if crossing at an intersection to keep a lookout for approaching vehicles, and if you believe from the evidence that Schain undertook to run from the bus stop on the west side of the street eastwardly across Lafayette Street without looking, or that if he looked, Schain failed to see or heed traffic that was obvious and in dangerous proximity, then he was negligent and, if you further believe that such negligence on his part was the sole proximate cause of the accident, then you must find your verdict for the defendant.

Mr. Ferrell: The defendant's objections and exceptions to the refusal of the defendant's proffered Instructions No. III and III-a have previously been covered.

We have no objection to the amendment the Court made of defendant's proffered Instruction IV in lieu page 379 } of the objection by the plaintiff, but we do submit that the real issue of the case is the maintenance of a proper lookout by the operator after he drove northwardly on Lafayette "from its intersection with Cutshaw." Up to that time his primary duty of lookout was directed towards the intersection and vehicles approaching the intersection or pedestrians that might be crossing at the intersection.

INSTRUCTION NO. IV, AMENDED AND GIVEN AS INSTRUCTION NO. 15, READS AS FOLLOWS:

The Court instructs the jury that the defendant, Virginia Transit Company, was not an insurer of the safety of the infant plaintiff, Louis Ralph Schain, and that the operator of the defendant's northbound bus, Harold J. Iddings, was not required to exercise more than ordinary care in discharging his duty of keeping a proper lookout as he was driving his bus northwardly on Lafayette Street from its intersection with Cutshaw Avenue.

Mr. Ferrell: The defendant objects and excepts to the Court's refusal of defendant's Instruction V because, as previously stated, this Instruction does specifically and consistently with the law applicable to this case, to the facts of this case, spell out the duty of keeping a proper page 380 } lookout of Harold J. Iddings for pedestrians, for traffic approaching the intersection, or in and about the intersection, and we think it is a correct statement of the law involved and it is only by considering all of those things which he was required by law to do that the jury can

determine the issue of whether, in the circumstances involved in this case, Mr. Iddings was keeping a proper lookout as he drove northwardly up to the point of the time when he saw the child involved in this case.

INSTRUCTION NO. V, REFUSED, READS AS FOLLOWS:

The Court instructs the jury that in determining whether or not Harold J. Iddings, the driver of defendant's bus, exercised ordinary care to keep a proper lookout for pedestrians who might run across the street between intersections as he crossed the intersection of Lafayette Street and Cutshaw Avenue and as he drove his bus northwardly from that intersection, you should take into consideration his duty to keep a proper lookout for the vehicular traffic which was in, about, or approaching that intersection, and his duty to maintain a proper lookout in the direction his bus was going.

Mr. Ferrell: The defendant objects and expects to the Court's refusal of its Instruction No. page 381 }

VI. We have amended that to where the Code of Virginia is stricken out because we submit that those tables which the statute, Code Section 46-1-195, requires the Court to take notice of what is set forth in that statute and, while we will admit that the stopping distances of automobiles and of trucks cannot be properly applied to a bus or vehicle of the type involved in this case, that the matter of the speed, the number of feet per second that a vehicle is going at the speed stated in this Instruction, 10, 15, 20, 25 miles an hour, is evidence or are matters which the jury should be advised about and may be considered by them along with all the other facts and circumstances in the case in arriving at their verdict, and that it is also true that here the bus operator, Iddings, is charged not with doing what an expert bus operator or any other driver would do insofar as his reaction time is concerned, but that the average driver reaction time of three-fourths of a second is all that he can be required to meet, and this Instruction states the average driver reaction time—I have a folder on that—which bears out the point, that this

is the number of feet that the vehicle will travel page 382 } straight ahead in the circumstances related in the statute while the driver reacts; that is, before the application of the brakes which, of course, the braking distance, another table is applicable, so this is really the reaction time of three-fourths of a second and the number of feet that a vehicle going in these circumstances, at certain miles an hour, will go and we think that this is very important informa-

tion and the Code requires the matter to be furnished to the jury; certainly, if the Court is required to notice it, pass it along upon proper tender or proffer to the jury and, as a matter of fact, it was in reliance on this section that we did not have any testimony in this case. We had prepared it but we didn't put it on as to the braking distances and reaction time, and so forth.

And, for the same reason, in part, we object and except to the Court's refusal of defendant's Instruction No. VI-A, which is the same as the previous Instruction with the exception of deletion of the average driver reaction time, because we still say that it is important and the jury ought to be told so that there won't be any speculation or doubt about it as to the number of feet per second vehicles go, page 383 } regardless of whether they are bicycles, trucks, buses, or even airplanes, at 10, 15, 20, 25 miles an hour, which is practically the span mentioned in this case, speed limit of 25 miles an hour. The tables do not afford us a speed of five miles an hour and that is the reason we left it out.

INSTRUCTION NO. VI, REFUSED, READS AS FOLLOWS:

The Court instructs the jury that the Code of Virginia provides the following tables of speed and driver reaction time. These tables are the result of experiments made with motor vehicles unloaded except for the driver, on dry, hard, approximately level stretches of highway free from loose material. These tables create no presumption in law.

SPEED IN		Average driver reaction
Miles per	Feet per	time ($\frac{3}{4}$ second) (in feet)
hour	second	11
10	14.67	16
15	22.0	22
20	29.34	27
25	36.62	

page 384 } By the Court—REFUSED. The statutory tables are based upon experiments with cars and trucks equipped with four wheel brakes and the reaction time figures obviously refer to the time between (1) the sensing of danger and (2) the effective action of the brakes. In the case at bar the bus was not shown to merely have four wheel brakes and no doubt it had air brakes in which event the effective action of the brakes no doubt would take effect

quicker which would reduce the reaction time. A few feet are important in the case at bar.

INSTRUCTION NO. VI-A, REFUSED BY THE COURT AND GRANTED, AS AMENDED, AS INSTRUCTION NO. 22, READS AS FOLLOWS:

The Court instructs the jury that the Code of Virginia provides the following tables of speed. These tables are the result of experiments made with motor vehicles unloaded except for the driver, on dry, hard, approximately level stretches of highway free from loose material. These tables create no presumption in law.

SPEED IN	
Miles per hour	Feet per second
10	14.67
15	22.0
20	29.34
25	36.62

page 385 } Mr. Ferrell: We have no objection to the refusal of Instruction VIII or the refusal of our Instruction IX, which was revised and given.

INSTRUCTION NO. VIII, REFUSED AS SUCH, BUT INSTRUCTION IV GIVEN IN LIEU HEREOF, READS AS FOLLOWS:

The Court instructs the jury that no alleged statement made by any witness contrary to her testimony can be viewed by the jury as pertinent, in any degree, of any of any fact or circumstance in such inconsistent statement, and you may consider such inconsistent statement only for the purpose of contradicting the witness.

INSTRUCTION NO. IX, AMENDED AND GIVEN AS INSTRUCTION NO. 21, READS AS FOLLOWS:

The Court instructs the jury that damages are not presumed nor may they be based upon speculation, but must be proven: and the burden is upon the plaintiff to prove by a preponderance of the evidence the manner, extent, and duration of future disability claimed and unless the manner, extent, and duration of such future disability is proven by a pre-

ponderance of the evidence, then the plaintiff cannot recover therefor.

And if the jury are uncertain as to the manner, or extent, or duration of any future disability claimed, then
page 386 } the jury cannot take into consideration any such item of claimed future disability in determining the plaintiff's damages, if any, because the plaintiff cannot recover for such element of damage.

Mr. Ferrell: We do, however, object and except to the Court's refusal of defendant's Instruction XI, for the reasons we previously stated to the Court and outlined in the recent Law Review Article in Washington-Lee Law Journal and American Bar Journal, copies of which I have over here, but I understand this matter has not been specifically approved, to say the least, by the Court of Appeals. We think, however, that in this case where there is just a question of damages, no question of reimbursement for hospital expenses and all, it is more appropriate in a case like this, if they are thinking of future disability, for example, not to consider such matters as state and federal income taxes.

INSTRUCTION NO. XI, REFUSED, READS AS FOLLOWS:

The Court instructs the jury that if any award is made to the plaintiff as damages in this case, such award is not subject to federal or state income taxes, and you should not consider such federal or state income taxes in fixing
page 387 } the amount of damages, if any, in accordance with the other Instructions of the Court.

Mr. Ferrell: We have no objection to the Court's revision of defendant's Instruction No. XIII.

INSTRUCTION NO. XIII, GIVEN AS AMENDED AS INSTRUCTION NO. 2, READS AS FOLLOWS:

The Court instructs the jury that you must consider this case solely upon the evidence before you and the law laid down in the instructions of the Court; and you must not allow any sympathy you may feel to influence your verdict. A verdict must not be based, in whole or in part, upon conjecture or surmise or sympathy, but must be based solely upon the evidence in the case and the instructions of the Court.

Mr. Ferrell: We object and except to the Court's refusal of XIV because this is specifically related to keeping a proper lookout for the plaintiff as he ran northeastwardly across Lafayette Street, north of the intersection of Lafayette and Cutshaw, and in a diagonal direction. I do think that word "diagonally" is more consistent with all the evidence in the case, and we do not believe that the substances of this Instruction have been incorporated as they should have been incorporated in the Court's Instruction 12 page 388 } and 13, and we object to those two Instructions, 12 and 13, for that reason, as I think I previously stated.

INSTRUCTION NO. XIV, REFUSED AS SUCH BUT COVERED IN INSTRUCTIONS NO. 12 AND 13, READS AS FOLLOWS:

The Court instructs the jury that the law does not undertake to hold someone liable for every accident, and in order for the plaintiff to recover in this case, you must believe from a preponderance of the evidence that the operator of the defendant's northbound bus, Harold J. Iddings, failed to keep a proper lookout for Louis Ralph Schain as Schain was running diagonally northeastwardly across Lafayette Street, north of the intersection of Lafayette Street and Cutshaw Avenue, and that such negligence, if any, was a proximate cause of injury to Louis Ralph Schain. If the plaintiff fails to show by a preponderance of the evidence either that the said bus operator was guilty of such negligence or that such negligence, if any, was a proximate cause of the collision, then you must bring in your verdict for the defendant.

Mr. Rosner: I think, to keep the record straight, I state the same objections I had to No. 13, being old No. 13, applied to the new Instruction No. 13 which has been granted by the Court.

The Court: I would like to say to counsel for page 389 } the plaintiff that Mr. Ferrell has tendered to me a new Instruction VI-A, in which he does not ask for the reaction time but simply for the mathematical calculations as to how far any vehicle, person, or anything else will go, how many feet per second it will go if the object is traveling at so many miles an hour and I don't know whether counsel for the plaintiff would object to it or not. It is a mathematical calculation and anybody can sit down and figure it out if they know how many feet are in a mile, but it may be

that plaintiff would desire such an instruction in the case.

Mr. Rosner: Your Honor, I think that if any Instruction along these lines is given, that the only way that the Instruction should be given should be somewhat along these lines—

The Court: May I interrupt counsel for the plaintiff and say if I gave such an Instruction, I will give it in this language, "The Court instructs the jury that the following table shows how far an object going at a certain speed will travel per second," and then list the table.

Mr. Wilson: Can the defendant at this point page 390 } state for the record that we would like such an Instruction.

Mr. Rosner: It seems to me it is a mathematical thing and I think it is all right, the way the Court stated it.

Mr. Ferrell: I am referring to the American Law Journal, March, 1960 issue, American Bar Journal, Volume 46, page 274, and 9 ALR (2d), 320, Volume 3, "Defense Counsel"; and Washington and Lee Law Review, Volume XVIII, Spring of 1961, page one; Washington and Lee Law Review, 1-6. If I could mention one thing, we would like to prevent a little hassle later on, but I would like to call their attention and the Court's attention to this Harrington case and my interpretation of that is that it is error not only to put these matters of damages on a daily basis or on other fixed bases on a blackboard, but it is also error to argue in that fashion because it is, in effect, as the Court says, it is counsel testifying.

Mr. Rosner: My impression of the Harrington case, it states that counsel cannot give the jury a per diem figure, or per hour figure or per year figure for any item of page 391 } damage because it is not in evidence and there is no way, no accurate way of determining it. It is purely up to the jury. However, I feel that we are entitled to tell the jury that he is entitled to recover for each hour and day—it is up to the jury to determine what he is entitled to. I think we can certainly argue that he is entitled to recover for each hour of pain that he suffered.

Mr. Ferrell: I don't.

(Discussion off the record.)

Mr. Ferrell: If the Court says you can do it, I will state my objection and exception here.

The Court: I don't particularly like the language "that he can recover." There is nothing in the Instruction that says he can recover for it. I think you can use a different

choice of language, that for every year, day, and hour that he suffered is something that the jury should take into consideration from the standpoint of argument. You can't mention any figures, obviously.

Mr. Rosner: One other thing since we are on the subject. This is a case that would lend itself to two types of argument, both of which are improper. One would be for me to ask the jurors to put themselves in Mr. Schain's position, which I certainly will not do. Another would be for Mr. Ferrell to ask the men to put themselves in the bus driver's position, which I imagine he is not going to ask them to do.

The Court: I am sure both of you know that would be improper. The only other thing I have to suggest is put in the table as Instruction No. 22.

INSTRUCTION NO. 6, GRANTED, READS AS FOLLOWS:

The Court instructs the jury that the law conclusively presumes that a child under the age of seven (7) years is incapable of contributory negligence. Therefore, since the age of the plaintiff at the time of the accident involved herein was under seven (7) years, no negligence in contributing to the collision can be imputed to him.

INSTRUCTION NO. 17, GRANTED, READS AS FOLLOWS:

The Court instructs the jury that if you believe from the evidence that Harold J. Iddings, operator of Virginia Transit Company's bus, was confronted with a sudden emergency without negligence on his part, then he was not required to exercise the same good judgment in such sudden emergency which would have been required of him in the absence of such sudden emergency, but he was required to exercise merely such judgment as an ordinarily prudent person might have exercised in the same or similar circumstances.

And, if you believe from the evidence, that Harold J. Iddings was confronted with a sudden emergency without negligence on his part, then the defendant cannot be held liable for any error of judgment of Iddings in such sudden emergency, if you believe from the evidence that Iddings exercised such judgment as an ordinarily prudent person might have exercised in such sudden emergency.

INSTRUCTION NO. 21, GRANTED, READS AS FOLLOWS:

The Court instructs the jury that damages are not presumed nor may they be based upon speculation, but must be proven; and the burden is upon the plaintiff to prove by a preponderance of the evidence the manner, extent, and duration of any future disability claimed.

And, if the plaintiff has failed to prove by a preponderance of the evidence the manner, or extent, or duration of any future disability claimed, or if the jury are uncertain as to the manner, or extent, or duration of any future disability claimed, then the jury cannot take into consideration any such unproven portion of the manner, or extent, or duration of such claimed future disability in determining the plaintiff's damages, if any, because the plaintiff cannot recover for any such unproven element.

INSTRUCTION NO. 22, GRANTED, READS AS FOLLOWS:

The Court instructs the jury that the following table shows the distance in feet per second that an object will travel at the respective speeds shown:

Speed	Distance
Miles per hour	Feet per second
5	7.34
10	14.67
15	22.00
20	29.34
25	36.62

Note: The following occurred in open court:

The Court: Gentlemen of the Jury, in every law suit there are two cardinal elements, one is the fact element; the fact element involves testimony of the witnesses from the stand and exhibits that come in and in an instruction here I am

later to tell you that you are the gentlemen that are the judges about what the facts are in the case.

The other cardinal element in any law suit is the law. My responsibility is to tell you what the law is governing a particular case. That responsibility is discharged by

the written instructions of the Court which are read to you by the Court and which you take to the jury room with you, but before that counsel for the parties in their argument on the case comment on these statements of law. In order, however, that you may more fully appreciate their comments and argument with respect to the law and how this law applies to the fact, I will read them to you at this time.

(The jury heard the instructions of the Court.)

* * * * *

page 41 }

* * * * *

Mr. Ferrell:

* * * * *

page 430 }

* * * * *

That leads me to this point, and that is the sudden emergency business. They mentioned it and I think the physical facts in this case and the preponderance of the evidence will show you gentlemen that the little boy ran into that wheel. And, if you look at the bus, you will see—the left front wheel, I mean to say—and if you look at that bus, you will see that the wheel is encased in a housing and he wouldn't have been thrown the way a lot of these witnesses talked about if that wheel hadn't been turned, and that is the reason I put that picture up there at the bottom, showing how the bus was turned. And they are doing a lot of talking and arguing about whether the bus was turned when somebody screamed, and so on. Well, I think the physical facts prove that the bus wheels had been turned and the bus was moving and trying to get out of the way just like Mr. Iddings said, when the little boy hit the wheel and the wheel threw him up. And that is the reason that I submit to you gentlemen, as reasonable men, and I think it is fair to say, based on the evidence in this case, that that little fleck, blood spot, that the police officer said was a fleck, is not and it never was shown to be the point of impact in this case, and it could not have been the point of impact in this case, based on the other evidence. You have to take all the credible

testimony because he was thrown backward, you will recall, and he was dragged forward.

* * * * *

page 432 }

* * * * *

So, as to the liability in the case, and here I might be repeating myself somewhat, the point of impact under the evidence in this case, on the bus—and that is why I have put the pictures up there over the top, they vary. One says one thing or another. I wasn't there, I don't know, I am
page 433 } not going to speculate. You observed the witnesses. Most of them said "close to the front wheel." I accept that.

* * * * *

page 448 }

* * * * *

Note: At 2:25 o'clock p. m. the jury retired to consider its verdict.

The Court: When I sent the jury out, they wanted to know if they could mark on the chart and I said no. In the alternative, I told them I had a blank one that you had submitted to me and when you came back I would find out if there was any objection to their having the blank exhibit.

Mr. Ferrell: No objection.

Mr. Rosner: No objection.

Note: At 5:20 o'clock p. m. the jury returned with the following verdict:

We the jury, on the issue joined, find for the plaintiff and assess his damages at \$53,000.00, date March 8, 1962.

Mr. Ferrell: Your Honor, could we have the jury polled?

(The jury was polled, and dismissed.)

* * * * *

A Copy—Teste:

H. G. TURNER, Clerk.

INDEX TO RECORD

	Page
Writ of Error and <i>Supersedeas</i> Awarded	1
Record	2
Amended Motion for Judgment	2
Order, July 20, 1961	4
Motion for a Bill of Particulars by Virginia Transit Company	4
Bill of Particulars	5
Motion to Strike	7
Order, September 19, 1961	7
Second Amended Motion for Judgment	9
Bill of Particulars	11
Answer and Grounds of Defense of Defendant Virginia Transit Company	12
Motion of Virginia Transit Company to Set Aside the Verdict of the Jury	13
Judgment, January 17, 1963	14
Order, February 5, 1963	15
Notice of Appeal and Assignments of Error by Virginia Transit Company	16
Assignment of Cross-Error by Louis Ralph Schain, an Infant, etc.	17
Proceedings 18, 30, 86, 131, 142, 146,	177
Witnesses:	
Robert E. Holland	19
Officer B. W. Hughes	26
Lucy Boettcher	42
Betty Richardson	48
Louis Ralph Schain	56
George Turner	61
Dr. William P. Spencer	62
Dr. Bernard D. Packer	65
James E. Huband	85, 143
John D. Leonard	88, 128
Jimmie D. Hepler	90
Carlton Douglas Cox	98
Bill Cooley	101
Officer H. C. Birkhead	105
Mrs. William M. Turner, Jr.	108
Sally Kincannon	111
Harold J. Iddings	120
Mary Lee Chalklev	132
Objections and Exceptions to Instructions	150
Jury Verdict	179