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Supreme Court of Appeals
Richmond, Va.

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Record No. 4976

In the Supreme Court of Appeals of Virginia at Richmond

CLINTON S. JONES, AN INFANT, ETC.

v.

ALUMINUM WINDOW AND DOOR CORPORATION, ET AL.

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 the Court, and at least three copies mailed or delivered to opposing counsel 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.

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND.

Record No. 4976

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Thursday the 22nd day of January, 1959.

CLINTON S. JONES, AN INFANT, ETC., Plaintiff in Error,

against

ALUMINUM WINDOW AND DOOR CORPORATION, ET AL., Defendants in Error.

From the Hustings Court of the City of Richmond, Part II

Upon the petition of Clinton S. Jones, an infant, who sues by Roger L. Jones, his father and next friend, a writ of error and *supersedeas* is awarded him to a judgment rendered by the Hustings Court of the City of Richmond, Part II, on the 3rd day of December, 1958, in a certain motion for judgment then therein depending wherein the said petitioner was plaintiff and Aluminum Window and Door Corporation and another were defendants; no bond being required.

RECORD

* * * * *

page 8 }

* * * * *

Filed in clerk's office March 4th 1958.

Teste:

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

INTERROGATORIES TO DEFENDANTS FILED ON BEHALF OF PLAINTIFF.

1. State the name of the person who was operating the vehicle that came into collision with the bicycle on which plaintiff was riding.

2. If the operator of the motor vehicle was Marvin A. Fellers, state, (a) whether he was in the employ of defendant Aluminum Window and Door Corporation; (b) where he had been; (c) what he had been there for and (d) where he was going at the time the motor vehicle collided with the bicycle.

3. Was Marvin A. Fellers, the operator of the motor vehicle, acting within the scope of his employment with Aluminum Window and Door Corporation when the motor vehicle collided with the bicycle?

4. State the type of motor vehicle said person was driving.

5. State whether the operator saw the plaintiff be-
page 9 } fore the vehicle came in contact with the bicycle on which plaintiff was riding.

* * * * *

page 11 }

* * * * *

Filed in clerk's office March 10th 1958.

Teste:

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

ANSWERS TO INTERROGATORIES.

Now come the defendants, Aluminum Window and Door Corporation and Marvin A. Fellers, and in answer to the interrogatories propounded to them by the plaintiff herein, answer as follows, the answers being keyed, numerically, to the questions propounded:

1. Mr. Fellers
2. (a) President
   (b) Home
   (c) For the evening and night
   (d) Had decided to return to office to catch up on work

3. No
4. 1956 Ford Country Sedan
5. Yes.
6. Approximately 20-30 feet
7. Right-hand side
8. Both vehicles traveling in general easterly direction
9. Right front edge of bumper of car struck rear wheel of bicycle
10. Approximately 40-45 miles per hour

page 12 } 11. (a) Yes
(b) Yes

12. (a) Yes
    (b) Yes
    (c) 350 feet on high beams and 100 feet on low beams under conditions of normal visibility

12 (A) No
13. No
14. In the right-hand driving lane
15. Low beam lights.

Given under our hands this 7th day of March, 1958.

ALUMINUM WINDOW AND DOOR CORPORATION
By MARVIN A. FELLERS, Pres.
MARVIN A. FELLERS.

State of Virginia,
City of Richmond, to-wit:

This day personally appeared before me, Elizabeth B. Daneman, a notary public in and for the City in the State aforesaid, Marvin A. Fellers, who being duly sworn, made

oath that the above answers to interrogatories are true to the best of his knowledge and belief.

Witness my hand and seal this 7th day of March, 1958.
My commission expires April 23, 1960.

ELIZABETH B. DANEMAN
Seal Notary Public.

* * * * *

page 17 } INSTRUCTION NO. 1.

The Court instructs the jury that the plaintiff, Clinton S. Jones, while riding on his bicycle had equal rights on the highway with the defendant in his automobile, and if the jury believe from the evidence that Clinton S. Jones was riding his bicycle on the right shoulder of the road or on the right edge of the hard surface of the road proceeding in an easterly direction, then he was riding where he had a right to ride.

M. R. D.

page 18 } INSTRUCTION NO. 2.

The Court instructs the jury that immediately before and at the time and place that Clinton S. Jones was injured, the law required the defendant, Marvin A. Fellers, to exercise ordinary care to perform the following duties:

1. To keep a reasonable careful lookout ahead for other persons lawfully using the highway in order that he might avail himself of what such a lookout would disclose so as to prevent endangering the life, limb or property of any such person;
2. Not to exceed a reasonable speed under the circumstances and traffic conditions existing at the time;
3. Not to drive his automobile recklessly or in a manner so as to endanger the life, limb or property of another;
4. To keep said automobile under proper control.

And if the jury believe from a preponderance of the evidence that the defendant failed to perform any one or more of these duties and that any such failure was the sole proximate cause of the collision, then the jury shall find their verdict in favor of the plaintiff.

M. R. D.

page 19 } INSTRUCTION NO. 3.

The Court instructs the jury that at the time and place of the collision here involved, it was the duty of the defendant, Fellers, to operate his automobile with such light from his headlights, considering the weather, traffic, his speed, and all the other circumstances then prevailing, as would enable him to reasonably discern the presence of a bicyclist on the right shoulder or right edge of the hard surface of the highway in time to take reasonable precautions thereafter to avoid a collision should such precautions later become necessary. And if the jury believe from the greater weight of the evidence that the defendant, Fellers, failed in any such duty and that any such failure was the sole proximate cause of the collision, then the jury shall find their verdict in favor of the plaintiff.

M. R. D.

page 20 } INSTRUCTION NO. 4.

The Court instructs the jury that a child under the age of fourteen years operating a bicycle along the highway is of itself a warning of danger and when a motorist sees or by the exercise of reasonable diligence under the circumstances should have determined that the bicyclist was a child, it is his duty in approaching such child to assume that the child might not operate the bicycle in a careful and cautious manner, and, under said assumption, to take such reasonable precaution as under the circumstances may be necessary to avoid a collision.

And if the jury believe from a greater weight of the evidence in this case that Fellers, the driver of the automobile, in approaching the point of collision, failed to perform the aforesaid duty and that any such failure on his part constituted the sole proximate cause of the collision, then the jury must find their verdict in favor of the plaintiff.

M. R. D.

page 21 } INSTRUCTION NO. 5.

The Court instructs the jury that even though you may believe from the evidence that the defendant through no prior fault of his own was confronted by a sudden emergency, nevertheless, if you further believe from a preponderance of the evidence that at the moment when the defendant arrived at

the point where he saw the plaintiff, if the plaintiff was at that same moment in a position of peril of which the plaintiff was unaware, and at the same moment the defendant knew, or in the exercise of ordinary care under the circumstances should have known, that a collision was imminent and that the plaintiff had no knowledge of his peril, then a duty arose in the defendant to exercise ordinary care to do such acts as were reasonable under all the circumstances to the end that a collision might be avoided if possible, and if the jury believe from a greater weight of the evidence that the defendant failed in any such duty and that any such failure was the sole proximate cause of the collision, then the jury shall find their verdict in favor of the plaintiff, and this is true irrespective of whether the plaintiff or the defendant or both of them were guilty of any negligence prior to the said moment when the defendant first saw the plaintiff.

M. R. D.

page 22 } INSTRUCTION NO. 6.

The Court instructs the jury that while the operator of a motor vehicle or bicycle must be constantly on the lookout for dangers in front, he is not, if he is making a lawful use of the highway, required to maintain such a lookout as to motor vehicles coming up from the rear, and the rule is that when two motor vehicles or a bicycle are being driven along a public road in the same direction the driver of the front vehicle owes no duty to the vehicle in the rear except to use the road in a lawful way, and until he has been made aware of the presence of such rear vehicle by signal or otherwise, he may assume, either that there is no vehicle in his rear, or that, if there is one, it is under such control as not to interfere with his free use of the road in any lawful manner.

M. R. D.

page 23 } INSTRUCTION NO. 7.

The Court instructs the jury that the law places the duty upon adults (i. e. those over the age of 21 years) to exercise reasonable and ordinary care under the existing circumstances for their own safety, and if an adult plaintiff fails to exercise such care or violates a statute then he is guilty of negligence, and if any such negligence efficiently contributes to cause an accident and resulting injuries to the plaintiff, it is called contributory negligence and bars the plaintiff

from recovery even against a defendant who may likewise have been guilty of negligence.

The Court further instructs the jury that with respect to persons under the age of 21 years, the law divides them into three groups with respect to their capacity as to negligence:

1. Those between 14 and 21 years—as to whom the law presumes that they are capable of negligent conduct, but their presumed capacity may be rebutted by evidence proving them to be incapable.
2. Those between 7 and 14 years—as to whom the law presumes that they are incapable of negligent conduct, but their presumed incapacity may be rebutted by evidence proving them to be capable.
3. Those under the age of 7 years—as to whom the law conclusively presumes that they are incapable of negligence.

M. R. D.

page 24 } INSTRUCTION NO. 8.

The Court instructs the jury that the care and caution required of a person under 21 years of age is measured wholly according to the maturity and capacity of such person, and this is to be determined by the circumstances of the case and the evidence before the jury. The law presumes that a child between the ages of 7 and 14 years is incapable of contributory negligence, and in order to establish that the plaintiff in this case was capable of contributory negligence, the burden is upon the defendant to prove by a preponderance of the evidence that by reason of maturity and capacity the plaintiff was capable of contributory negligence with respect to the circumstances involved in this case, and unless the defendant proves such capacity you cannot deny the plaintiff a recovery on the ground of alleged contributory negligence.

M. R. D.

page 25 } INSTRUCTION NO. 9.

The Court instructs the jury that even though you find from the evidence and under the other instructions of the Court that the plaintiff was capable of contributory negligence, nevertheless, as in a case where the plaintiff is an adult, the burden is upon the defendant to prove by a preponderance of the evidence that the plaintiff was guilty of such negligence and that any such negligence efficiently con-

tributed to cause the accident, and unless the defendant proves the existence of such negligence or unless it appears from all the circumstances of the case, you cannot deny the plaintiff a recovery on the ground of contributory negligence.

M. R. D.

page 26 } INSTRUCTION NO. 10.

The Court instructs the jury that by preponderance of evidence is meant that evidence which is most convincing and satisfactory to the minds of the jurors. In determining upon which side the preponderance of the evidence is, the jury may take into consideration the opportunities of the several witnesses for seeing and knowing the things to which they testify, their interest (if any), or want of interest (if any), in the result of the action, the probability of the truth of their several statements, in view of all the other evidence and the facts and circumstances upon the trial; and from all the circumstances determine the weight or preponderance of the evidence. The jury are the sole judges of the weight of the evidence and credibility of the witnesses.

M. R. D.

pag 27 } INSTRUCTION NO. 11.

The Court instructs the jury that if they shall find for the plaintiff Clinton S. Jones, they will assess his damages at such sum that will compensate him for the following:

(1) the bodily injuries sustained;
(2) physical pain and mental anguish suffered and endured by him in the past, and that which will be endured by him in the future, if any, as a result of his injuries;
(3) the effect of the injuries upon his health, mental and physical, according to the degree and the probable duration of the same;
(4) his pecuniary loss from his diminished capacity for earning money in the future according to what the jury finds his probable expectancy, if he had not sustained the injury; and from these as proven from the evidence, assess such damages as will compensate the plaintiff for the injuries and disability sustained as a result of the accident.

M. R. D.

page 28 } INSTRUCTION NO. 12.

The Court instructs the jury that if they return a verdict in favor of the plaintiff they shall return it against both the defendant, Marvin A. Fellers and the Aluminum Window and Door Corporation.

M. R. D.

page 29 } INSTRUCTION NO. 13.

The Court instructs the jury that the fact that there has been an accident and that as result thereof the plaintiff has been injured, does not of itself alone entitle the plaintiff to recover, but before the plaintiff can recover against the defendants the burden is upon the plaintiff to prove by a preponderance of the evidence that the defendant was guilty of negligence and that any such negligence was the sole proximate cause of the accident.

M. R. D.

page 30 } INSTRUCTION NO. 14.

The Court instructs the jury that negligence cannot be presumed and you cannot base your verdict upon speculation, surmise or conjecture, but must base it entirely upon the evidence before you. You must not in any manner allow sympathy to influence you in arriving at a verdict. You are further instructed that if you cannot determine and are uncertain, from a preponderance of the evidence whether or not the defendant Fellers was guilty of negligence proximately causing the accident, or if, from the evidence, you believe it to be equally as probable that the accident resulted from causes for which defendant Fellers was not responsible as from causes for which he was responsible, in either event, you should find your verdict for the defendants.

M. R. D.

page 31 } INSTRUCTION NO. 15.

The Court instructs the jury that unless or until, in the exercise of ordinary care, he should have discovered to the contrary, the defendant Fellers had the right to assume that other persons using the highway, including the plaintiff, would

obey all traffic rules and regulations and would exercise reasonable care for their own safety.

M. R. D.

page 32 } INSTRUCTION NO. 16.

The Court instructs the jury that if you believe from the evidence that the defendant Fellers was operating his vehicle, immediately prior to the accident, in a careful and prudent manner and if you further believe that the plaintiff swerved suddenly onto the highway and that Fellers was thereby confronted with a sudden emergency, then the law only requires that his action thereafter be that which a person of ordinary prudence might have done under similar circumstances to avoid a collision, and if you believe that he did so act then Fellers was not guilty of negligence because another course of action might have been more judicious.

M. R. D.

page 33 } INSTRUCTION NO. 17.

The Court instructs the jury that the defendant Fellers was not necessarily guilty of negligence in not having seen the plaintiff until a collision was imminent. He was only required to exercise ordinary care to keep a proper lookout and to see the plaintiff's bicycle if it was in reasonably plain view taking into consideration all the surrounding circumstances. If, therefore, you believe from the evidence that under all the then existing circumstances the plaintiff and his bicycle were not reasonably discernable to the defendant Fellers even though exercising a reasonably careful lookout, until it was too late, in the exercise of ordinary care, for him to avoid a collision, then you must find that Fellers was keeping a proper lookout.

M. R. D.

page 34 } INSTRUCTION NO. 18.

The Court instructs the jury that before a bicyclist leaves the shoulder of a highway and drives up onto the hard surface thereof he must first exercise ordinary care to see that such movement can be made in safety, and, whenever the operation of any other vehicle may be affected by such movement, he shall give a signal plainly visible to the driver of such other

vehicle of his intention to make such movement. And if the jury believe from the evidence that the plaintiff violated this duty, and that taking into consideration his age, general intelligence, maturity and experience, he knew, or in the exercise of reasonable care for his own safety should have known of the danger involved in such a movement, then he was guilty of negligence. And if the jury further believe from the evidence that any such negligence either proximately caused or efficiently contributed to cause the collision, then you must find your verdict in favor of the defendants, and this is true even though you may find that the defendant Fellers was also negligent.

M. R. D.

page 35 } INSTRUCTION NO. 19.

The Court instructs the jury that under the law of Virginia the plaintiff was required to have the following equipment upon his bicycle:

"Every bicycle shall be equipped with a lamp on the front thereof which will give a light visible under normal atmospheric conditions from a distance of at least three hundred feet in front of such bicycle and shall also be equipped with a lamp on the rear which will exhibit a red light visible under like conditions from a distance of at least three hundred feet to the rear of such bicycle.

"In lieu of the rear light on bicycles provided for above, there may be substituted reflex reflectors to be permanently affixed to the rear of bicycles of a type, size and color approved by the Division of Motor Vehicles."

If the jury believe from the evidence that the plaintiff violated the foregoing duty, and that taking into consideration his age, general intelligence, maturity and experience, he knew, or in the exercise of reasonable care for his own safety, should have known of the danger of any such violation, then he was guilty of negligence and if you further believe that any such negligence existed and was either the sole proximate cause of the accident or that it efficiently contributed with any negligence of the defendant Fellers to cause the accident, in either case the plaintiff cannot recover and you must find your verdict for the defendants.

M. R. D.

page 36 } INSTRUCTION NO. 20.

The Court instructs the jury that while a child between the ages of 7 and 14 years is presumed to be incapable of negligence, yet this presumption is rebuttable and may be overcome by the circumstances in any given case. If the jury believe from the evidence in this case that the plaintiff, by reason of age, mentality and experience was capable of appreciating danger in any particular aspect while riding a bicycle under the circumstances of this case, then as to any such aspect in which he capable of appreciating danger he owed a duty to exercise reasonable care for his own safety, and in any such case failure on his part to exercise such care would constitute negligence, which, if it proximately caused or efficiently contributed to cause the collision, would bar his recovery of a verdict in his favor.

M. R. D.

page 37 } INSTRUCTION NO. 21.

The Court instructs the jury that if you find under the other instructions of the Court that the plaintiff was capable of negligence, then if you further believe from the evidence that both plaintiff and defendant were guilty of negligence efficiently contributing to cause the accident, you cannot find for the plaintiff but must find your verdict for the defendants.

M. R. D.

* * * * *

page 40 } PLAINTIFF'S INSTRUCTION NO. 3.

The Court instructs the jury that any alleged contributory negligence of the said Clinton S. Jones is not a defense in this case and if the defendant, Fellers, was guilty of any negligence which either caused *of* efficiently contributed to the collision, the jury must find a verdict for the plaintiff.

By the Court: Refused; the question of the plaintiff's capacity is one of fact in this case and is a question for the jury.

M. R. D.

page 41 } INSTRUCTION NO. 3.

Stanley v. *Tomlin,* 143 Va. 187, 129 S. E. 379
Farmer v. *Cimino,* 185 Va. 965, 41 S. E. (2d) 1
Richmond Traction Co. v. *Wilkinson,* 101 Va. 394
Morris v. *Peyton,* 148 Va. 812, 139 S. E. 500, (child 13) (degree of care) (Good case)
Filer v. *McNair,* (rule stated) 158 Va. 88, 16 S. E. 335 (*Petrach* v. *Marshall*)
Wash v. *Holland,* 166 Va. 45, 183 S. E. 236
Norfolk Southern Ry. Co. v. *Wood,* 182 Va. 30, 28 S. E. (2d) 15
Roanoke v. *Shull,* 97 Va. 419
Price v. *Burton,* 155 Va. 229, 154 S. E. 499
Edgerton v. *Norfolk Southern Bus Corp.,* 187 Va. 642, 47 S. E. (2d) 642

page 42 } PLAINTIFF'S INSTRUCTION NO. 4.

The Court instructs the jury that the law presumes every child under the age of 14 years to be incapable of contributory negligence. The burden is upon the defendant to establish the capacity and maturity of Clinton S. Jones in this case, since he was under the age of 14 years when he was injured.

In the absence of a preponderance of evidence showing that Clinton S. Jones was capable of contributory negligence, or if it be shown that he was actually capable of contributory negligence, in the absence of a showing by the preponderance of the evidence that he was in fact guilty of contributory negligence, in either case, the jury must proceed upon the presumption that Clinton S. Jones was not guilty of contributory negligence and decide the issue accordingly.

By the Court: Refused as such, but covered in other instructions given.

M. R. D.

page 43 } PLAINTIFF'S INSTRUCTION NO. 5.

The Court further instructs the jury that the conduct of an infant under the age of 14 years is not of necessity to be judged by the same rules which govern that of an adult; that while it is the general rule in regard to an adult, or grown person, that to entitle him or her to recover damages for an injury resulting from default or negligence of another, he or she must have been free from fault, such is not the rule in

regard to a person under 14 years of age. The care and caution required of a child is according to its maturity and capacity wholly, and this is to be determined by the circumstances of the case, and the evidence before the jury; and the rule presumes that a child between the ages of 7 and 14 years cannot be guilty of contributory negligence, and in order to establish that a child of such age is capable of contributory negligence, such presumption must be rebutted by evidence and circumstances establishing his maturity and capacity.

By the Court: Refused as such but covered in other instructions of the Court.

M. R. D.

* * * * *

page 46 } PLAINTIFF'S INSTRCTION NO. 8.

The Court instructs the jury that at the time and place of the accident here involved, it was the duty of the defendant, Fellows, to operate his automobile on high beam lights and that driving the said automobile on low beam lights was negligence and if the jury shall believe that such negligence was the sole proximate cause of the accident, they must find for the plaintiff and assess his damages in accordance with the instruction on damages.

By the Court: Refused.

M. R. D.

Code Sections 46-277; 46-279.
Barry v. *Tyler,* 171 Va. 381.
Nicholson v. *Stroup* not yet reported.

page 47 } PLAINTIFF'S INSTRUCTION NO. 10.

The Court instructs the jury that it was the duty of the driver of the automobile to exercise ordinary care and vigilance in order to discover the presence of the child, Clinton S. Jones upon the highway under the circumstances and conditions then existing and if they believe from the greater weight of the evidence that the said driver of the automobile failed to exercise such care and diligence and that such failure was the sole proximate cause of the collision they must find a verdict for the plaintiff in a proper sum.

By the Court: Refused. Adequately covered in other instructions given.

M. R. D.

* * * * *

page 48 } PLAINTIFF'S INSTRUCTION NO. 11.

The Court instructs the jury that if they believe from a greater weight of the evidence that when Fellers, the driver of the automobile, arrived at a point where he saw or by the exercise of reasonable care should have seen, the child, Clinton S. Jones, on his bicycle upon the highway and that he knew or by the exercise of reasonable care should have known that a collision was imminent and that the said child had no knowledge of his peril, then the duty arose in him to sound his horn and thus give warning of his approach; and if the jury believe from the greater weight of the evidence that he failed to sound his horn, then he was guilty of negligence.

By the Court: Refused.

M. R. D.

* * * * *

page 49 } PLAINTIFF'S INSTRUCTION NO. 12.

The Court doth further instruct the jury, that the conduct of an infant is not of necessity to be judged by the same rule which governs that of an adult. While it is the general rule in regard to an adult or grown person, that to entitle him to recover damages for any injury resulting from the fault or negligence of another, he or she must have been free from fault, such is not the rule in regard to an infant of tender years. The care and caution required of a child is according to his or her maturity and capacity wholly, and this is to be determined by the circumstances of the case, and the evidence before the jury; and the law presumes that a child between the ages of seven and fourteen years cannot be guilty of contributory negligence, and in order to establish that a child of such age is capable of contributory negligence, such presumption must be rebutted by evidence and circumstances, establishing her maturity and capacity.

The jury is further instructed by the court that if the defendant relies upon the contributory negligence of Clinton S.

Jones to defeat the plaintiff's action, the burden of proving such contributory negligence rests on the defendant, and it will not avail the defendant, unless it has been established by a preponderance of the evidence.

By the Court: Refused as such, but covered in the other instructions given.

M. R. D.

* * * * *

page 50 } PLAINTIFF'S INSTRUCTION NO. 15.

The Court instructs the jury that the conduct on the part of the plaintiff's parents, or either of them, in sending or permitting plaintiff to ride his bicycle on the highway at night is not to be considered by them on the issue of the contributory negligence of the child. The test under the law is not how careful the parents were or should have been, but was the child an average youngster of his age, education, maturity and experience. If he was, and he acted as such, then he was not guilty of contributory negligence.

By the Court: Refused.

M. R. D.

page 51 } DEFENDANT'S INSTRUCTION NO. 1.

The Court instructs the jury that in this case the plaintiff and his parents have sworn that at no time was the plaintiff or his bicycle on the hard surface of the highway, and that the defendant's automobile struck the plaintiff's bicycle while said bicycle was on the shoulder of the road approximately one foot off the hard surface. The plaintiff is bound by his own version of the facts, and cannot ask the jury to believe that the collision happened in any other manner. Therefore if you believe from the evidence in this case that the plaintiff has not proved by a preponderance of the evidence in this case that the collision happened in the manner testified to by him, then you must find your verdict in favor of the defendant. You may not find in this case in favor of the plaintiff unless you believe that the collision happened while the bicycle was a foot from the hard surface on the shoulder at the time it was struck.

By the Court: Refused.

M. R. D.

page 52 } DEFENDANT'S INSTRUCTION NO. 1A.

The Court instructs the jury that the plaintiff's case can rise no higher than, nor can it be predicated upon a set of facts entirely different from the facts which plaintiff alleges. Plaintiff contends that at the time he was struck, he was traveling upon the dirt shoulder of the road and that defendant's vehicle struck him while he was upon the shoulder of the road and that at no time did he ever travel to the hard surface. If, therefore, you believe from the evidence that plaintiff turned from the shoulder onto the hard surface directly into the path of the defendant's oncoming vehicle without first looking to ascertain whether there was approaching eastbound traffic, and that the defendant Fellers did not, in the exercise of ordinary care, see the plaintiff's bicycle until immediately prior to the accident, then you must find your verdict in favor of the defendants.

By the Court: Refused.

M. R. D.

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page 56 } DEFENDANTS INSTRUCTION NO. 7. See § 173

The Court instructs the jury that every person riding a bicycle upon a highway is subject to the provisions of Virginia Code section 46-183 of the Code of Virginia.

You are further told that this section applies to the rider of a bicycle, whether he be child or adult.

At the time of the accident here involved, the following statute was in full force and effect governing the operation of vehicles—including bicycles—over and along the highways of the State of Virginia:

"Every driver who intends to * * * turn or partly turn from a direct line shall first see that such movement can be made in safety, and whenever the operation of any other vehicle may be affected by such movement, shall give a signal * * * plainly visible to the driver of such other vehicle of his intention to make such movement."

If, therefore, you believe from the evidence that the plaintiff, just prior to the accident, was riding upon the shoulder of the highway and that without giving any signal, he suddenly turned onto the hard surface portion of the highway,

into the path of the defendant Fellers' oncoming
page 57 } vehicle, then plaintiff was guilty of negligence, and
if you further believe that such negligence existed and was an efficiently contributing cause of the collision, then you must find your verdict in favor of the defendants, and this is true even though you may believe that the defendant Fellers was also negligent.

By the Court: Refused.

M. R. D.

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page 60 } DEFENDANTS INSTRUCTION NO. 8.

The Court instructs the jury that under the statutes of the State of Virginia, plaintiff was required to have affixed to the rear fender of his bicycle a reflector such as is required by sections 46-268 and 46-270 of the Code of Virginia, which provide:

§46-268. "Every bicycle shall be equipped with a lamp on the front thereof which will give a light visible under normal atmospheric conditions from a distance of at least three hundred feet in front of such bicycle and shall also be equipped with a lamp on the rear which will exhibit a red light visible under like conditions from a distance of at least three hundred feet to the rear of such a bicycle."

§46-270. "In lieu of the rear light on bicycles provided for in §46-268 and of lamps or lanterns to be carried by other than self-propelled vehicles, there may be substituted reflex reflectors to be permanently affixed to the rear of bicycles and to the rear and front of such vehicles other than self-propelled vehicles to be of a type, size and color approved by the Superintendent."

page 61 } If you believe from the evidence that plaintiff
was operating his bicycle without such reflector, then he was guilty of negligence and if you further believe that such negligence existed and was either the sole proximate cause of the accident or that it efficiently contributed with the negligence of the defendant Fellers to cause the accident, in either case the plaintiff cannot recover and you must find your verdict for the defendants.

By the Court: Refused.

M. R. D.

* * * * *

page 73 }

* * * * *

The Court, heretofore having heard the argument of counsel upon the defendants' Motion and Amended Motion To Set Aside the Verdict of the Jury, and having considered the briefs and memoranda of counsel thereon, and now being of opinion, for reasons stated in a Memorandum Opinion hereby filed:

(1) That the Motions of the defendants to enter final judgment for the defendants, or in the alternative to award a new trial on all issues, or in the alternative to award a new trial on the issue of damages, should be overruled; therefore, the Court doth overrule the aforesaid Motions; to each and all of which actions of the Court, the defendants, by counsel, object and except.

(2) That the Motion of the defendants that the verdict of the jury is excessive should be sustained; wherefore, the Court doth require the plaintiff to remit $65,000.00 of the $125,000.00 verdict rendered by the jury, and it is ordered by the Court that the plaintiff recover of the defendants, Aluminum Window and Door Corporation and Marvin A. Fellers, the sum of $60,000.00 with interest at the rate of six per cent per annum from March 24, 1958, until paid, and his costs by him about this suit in his behalf expended.

To which action of the Court in requiring a remitter of $65,000.00 and in reducing the verdict of the jury, the plaintiff, by counsel, objects and excepts.

page 74 } And to the action of the Court in not requiring a larger remitter and in awarding judgment for the plaintiff in the amount of $60,000.00, or in any amount whatever, the defendants, by counsel, object and except.

Enter 12/3/58.

M. R. D.

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page 75 }

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MEMORANDUM OPINION.

Doubles, J. This is an action at law brought on behalf of the infant plaintiff to recover for personal injuries received when, as a bicyclist, he was struck by the automobile driven by the defendant. The jury returned a verdict in favor of the plaintiff and fixed his damages at $125,000.00. The defendants have moved to set aside this verdict on several grounds, and while not discounting some of these grounds, this opinion is directed toward four of the alleged grounds: (1) That the plaintiff's testimony and theory of the collision is in conflict with the physical facts; (2) That the Court erred in giving an instruction on the "Last Clear Chance" doctrine; (3) That the Court erred in its granting and refusing of instructions relative to lights required on the defendant's automobile; and (4) That the Verdict is excessive.

INTRODUCTORY FACTS.

Only so much of the facts as are pertinent to the four foregoing issues will be stated.

The plaintiff, age 13, was riding a bicycle on the right-hand side of the eastbound portion of U. S. Route 60. It was after dark and the weather was bad, a drizzling rain falling. The defendant was approaching in the same direction and from the rear of the plaintiff. The extreme right-hand portion of the front bumper of the defendant's car struck the rear wheel of the plaintiff's bicycle, throwing the plaintiff therefrom and causing injuries to be described later herein.

page 76 } PLAINTIFF'S THEORY—PHYSICAL FACTS.

The defendant earnestly and forcibly contends that the theory of the plaintiff's case is in irreconcilable conflict with the physical facts and therefore final judgment should be entered for the defendant.

The evidence establishes that while in general the defendant's automobile approached the plaintiff's bicycle from the rear, yet at the moment of impact they were at an angle; that is to say, the immediate path of the bicycle was not parallel with that of the automobile but was at an angle to the right of the path of the automobile. This is readily discernable by observation of the damage to the rear wheel of the bicycle which is bent to the left with the impact marks appearing on the right side of the rear fender and wheel thereof.

The plaintiff testified that he was at all times on the

shoulder of the road. The defendant testified that he (the defendant) was at all times on the hard surface, and he is corroborated in this by evidence showing no automobile tire marks on the shoulder (the shoulder being wet from rain at the time). From this the defendant contends that the plaintiff is simply in error in his testimony that he was at all times on the shoulder; that in fact he must have just come up onto the hard surface suddenly into the path of the defendant's car in accordance with the defendant's testimony, and that under these circumstances he cannot recover because (1) that is inconsistent with the plaintiff's theory that he was struck while on the shoulder; (2) that under the defendant's testimony, he had no opportunity to avoid a collision; (3) that such action by the plaintiff constitutes contributory negligence as a matter of law.

With respect to contentions (2) and (3) these are matters interwoven with two other features of the case, page 77 } viz., the capacity of the infant plaintiff to be capable of contributory negligence, and if capable whether the defendant nevertheless had the Last Clear Chance to avoid a collision, which will be discussed later herein.

With respect to contention (1) the following observations may be pertinent. Plaintiff's Exhibit No. 6 is a picture showing the scene, and it reveals that the dirt portion of the shoulder meets a macadam shoulder in an extremely irregular fashion, and a bicyclist riding on the shoulder could very readily be on dirt at one moment and on the macadam shoulder the next without ever getting up onto the hard surface proper. On the other hand a motorist driving as close to the right hand edge of the highway as the defendant was, could readily have part of his car overhanging the macadam portion of the shoulder, indeed his wheels could be on this macadam shoulder without leaving tiremarks in the soft or wet dirt portion of the shoulder.

It must be remembered that we are here dealing with inches, i. e., the extreme right portion of the auto bumper (either 3 or 7 inches thereof) striking the rear wheel of the bicycle.

Under all the foregoing circumstances the Court is of opinion that the jury could have found from the evidence that at the moment of impact the defendant's car was close, dangerously so, to the right edge of the hard surface or shoulder macadam; that the plaintiff's bicycle was at a slight angle to the right either on the macadam shoulder or on that part of the dirt shoulder immediately adjacent thereto; that the extreme right end of the auto bumper struck the rear fender of the bicycle while at this angle; that under these

circumstances the bicycle would be on the shoulder and that no tire marks of the auto would appear on the dirt portion of the shoulder;—and the Court is of opinion that such a finding is consistent with both the plaintiff's theory and the physical facts.

page 78 } LAST CLEAR CHANCE.

The defendant testified that he first saw the plaintiff when he was within 20 to 30 feet of him. The jury had the right to believe that he saw the plaintiff at a much greater distance. The defendant is a very poor judge of distances. He estimated the width of the grass plot separating the two highways at from 12 to 15 feet, whereas actual measurement showed it to be 39 feet or approximately three (3) times the distance estimated by the defendant. If his estimate of the distance he was from the plaintiff when first seen is as poor, he must have seen him when from 60 to 90 feet away. Some of the expert testimony is to the effect that he could have seen the plaintiff under the conditions existing at as great a distance as 100 feet, therefore the jury had a right to believe that the distance estimated by the defendant as 20 to 30 feet was in fact a much greater distance.

The defendant, by reference to a dent in his front bumper, fixed the point of impact thereon (1) at 3 inches from the right-hand extremity thereof in one portion of his testimony, and (2) at 7 inches therefrom in another portion. In either event, and whether at 20 feet or 90 feet from the plaintiff, all the defendant had to do to avoid striking the plaintiff after he actually saw him, was to guide his auto very slightly to the left. The angle of veering to the left would have to have been very slight indeed even at the speed of 45 miles per hour. We do not have to take into consideration the problem of reaction time involved in a braking situation where time must be allowed to transfer the foot from the accelerator to the brake pedal—for here we have a driver with hands on a steering wheel who has only to pull the wheel slightly to the left, an instantaneous operation.

Under all these circumstances, the Court is of opinion that a situation was presented wherein a jury
page 79 } question was presented as to whether the defendant had a Last Clear Chance to avoid the accident.

The plaintiff requested instructions which would have required the defendant to do specific things, but the Court refused to thus point out his specific avenues of escape to the jury and gave in lieu thereof a general last clear chance

instruction of the conservative variety believed to be approved by the expressions of the minority of the Supreme Court of Appeals.

AS TO LIGHTS.

At the point of the accident, Route 60 is a dual highway, i. e., a two-lane highway running east and a two-lane highway running west, with a grass plot thirty-nine (39) feet wide separating the two highways. The defendant testified that he was operating at approximately 45 miles per hour and on low beam lights. The defendant tendered an instruction based upon the theory that the defendant was compelled by law to drive on low beam lights in view of approaching traffic on the westbound highway. The plaintiff tendered an instruction based upon the theory that the defendant was on a one-way highway, i. e., eastbound only, and that he was compelled by law to operate on high beam because he could never be meeting oncoming traffic thereon. The Court refused to give either one, and gave an instruction on the common law duty.

The Court is of opinion that with respect to dual lane highways, which are separated by a wide grass plot, the General Assembly has failed to adopt any regulation. The statutes on the subject were adopted before the building of the modern dual highways, and while they might be applicable to those super-highways whose dual lanes are separated by a double white line or a narrow cement curb or thin grass plot where bright lights from cars might as readily blind the oncoming driver as they would upon the ordinary two-way highway—the Court is of opinion that the General Assembly page 80 } could not have anticipated nor intended them to be applicable to the widely separated dual highways of today some of which are a hundred feet or more apart with woods between the two. What we really have in cases like the present are two separate highways; indeed they are often so marked, i. e., U. S. 60 EAST—U. S. 60 WEST.

Furthermore, considering the weather, there may be some doubt as to whether statutes passed to apply under normal conditions are applicable. While the Court is of opinion that there is more to be said in favor of the plaintiff's theory than that of the defendant, nevertheless on principle the Court is of opinion that under all the circumstances, common sense dictates that no statute was applicable and that the defendant was bound by a common law duty.

THE SIZE OF THE VERDICT.

The principal permanent injury suffered by the 13 year old plaintiff boy in this case was a tearing away from the spinal cord of a group of nerves (the brachial plexus) which control the motor activity of the left arm, resulting in a paralysis of that arm. The arm, unless amputated, will wither. Incidental to this was the pain and suffering endured by this type of injury, and the humiliation and inconvenience to be occasioned for the balance of the plaintiff's life (estimated at 56 years). The jury awarded a verdict of $125,000.00.

Is this verdict excessive? The Court is of opinion that it is excessive, and can only account for its size by speculating that it was the result of undue sympathy for an attractive, bright, and intelligent young lad, who gave every impression on the witness stand of being thoroughly honest. Weighed against this was what the jury were well warranted from the evidence in concluding to be wholly inexcusable and irresponsible operation of a motor vehicle by the de-
page 81 } fendant. To see such a lad's physical future ruined to the extent it was by such operation of a motor vehicle, was well calculated to stimulate sympathy despite the Court's instructions on this aspect of the law, and the Court can account for the large amount of the verdict in no other way.

The Court has two alternatives—(1) to award a new trial on damages alone, or (2) to prescribe a remitter and enter up final judgment. Practical considerations are involved in making a decision. With the docket of this Court already set into October 1959, the plaintiff would be greatly prejudiced by such a delay. With the "average verdict rule" at its command and a consideration of the present state of economy, the Court is modestly of opinion that it can prescribe a remitter which will result in substantial justice.

From figures obtained from an actuary (and filed herein as a Court exhibit) it is learned that approximately $20,000.00 invested now at 3% interest annually, would provide the plaintiff with $1,000.00 per year from age 21 through age 69 (which is his present life expectancy), at the end of which the entire corpus would be exhausted.

Much evidence was introduced at the trial to show the present income of skilled workers. Taking this evidence into consideration insofar as possible diminished earning capacity of the plaintiff is concerned, and making appropriate allowance for the other elements of damage to which the plaintiff is entitled, and when weighed against verdicts in other cases throughout the land for injuries comparable to those sus-

tained here, the Court is of opinion that no verdict in excess of $60,000.00 can be sustained.

It is the opinion of the Court therefore that a remitter of $65,000.00 should be required of the plaintiff.

December 3, 1958.

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page 84 }

* * * * *

The trial court having required the plaintiff to remit $65,000 of his recovery in this case as ascertained by the verdict of the jury, now comes the plaintiff and accepts the judgment of the court for the reduced sum of $60,000 but under protest, as provided by Code of Virginia, 1950, §8-350 and excepts to the action of the court in refusing to render judgment upon the verdict of $125,000 and in lieu thereof requiring said remitt*ur*, upon the ground that the evidence on the subject of damages amply supports the verdict of $125,000.

Given under my hand this 4th day of December, 1958.

GEO. E. ALLEN,
Attorney for Plaintiff.

Filed December 4th, 1958.

Attest:

CHAS. R. PURDY, Clerk.

page 85 }

* * * * *

NOTICE OF APPEAL AND ASSIGNMENT OF ERROR.

Clinton S. Jones, an infant who sues by Roger L. Jones, his father and next friend, plaintiff in the above styled action, hereby gives notice of his appeal to the Supreme Court of Appeals of Virginia from a final judgment entered in this action on the 3rd day of December, 1958; and duly files this, his appeal, together with the following assignment of error;

1. The Court erred in requiring the plaintiff to remit $65,000 of the $125,000 verdict rendered by the jury and in ordering that the plaintiff recover of the defendants the sum of $60,000 only.

Given under our hands this 8th day of December, 1958.

CHARLES E. MAURICE
GEO. E. ALLEN.

Filed in clerk's office December 9th 1958.

Teste:

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

* * * * *

page 86 }

* * * * *

Filed December 11th, 1958.

Attest:

CHAS. R. PURDY, Clerk.

CROSS ASSIGNMENT OF ERROR.

Aluminum Window and Door Corporation and Marvin A. Fellers, defendants in the above styled action, hereby file this, their cross assignments of error, pursuant to rule 5:1 par. 4 of the Rules of Court of the Virginia Supreme Court of Appeals:

1. The Court erred in overruling the defendants' motion made at the conclusion of the plaintiff's evidence and renewed at the conclusion of all of the evidence to strike the evidence of the plaintiff upon the ground that he was guilty of negligence as a matter of law, which efficiently contributed to cause the accident.

2. The Court erred in overruling defendants' motion to set aside the verdict of the jury and to enter final judgment in favor of defendants upon the grounds:

(a) that plaintiff's position as disclosed by his evidence and that of his witnesses is in irreconcilable conflict with the undisputed physical facts present in the case, leaving only defendants' theory supported by defendants' evidence which was consistent with the physical facts.

page 87 } (b) under the facts and undisputed physical facts of the case, the plaintiff was guilty of contributory negligence as a matter of law, barring recovery herein.

3. The Court erred in overruling defendants' motion to set aside the verdict of the jury and to award the defendants a new trial upon all issues upon the grounds that the verdict was contrary to the law and the evidence.

4. The Court erred in overruling defendants' motion to set aside the verdict of the jury and to award the defendants a new trial upon all issues upon the grounds of misdirection of the jury by the Court in the following particulars:

(a) The Court erred in granting, over defendants' objection, instruction number 3 which left to the jury the issue of whether or not defendant Fellers was negligent in operating his vehicle upon low beam at the time of the accident rather than upon high beam, defendant's duty in this regard being governed by statute.

(b) The Court erred in granting, over defendants' objection, instruction number 5 which *erroniously* injected into the case the issue of last clear chance.

(c) The Court erred in granting, over defendants' objection, instruction number 4.

(d) The Court erred in granting, over defendants' objections, instructions numbered 7 and 8.

page 88 } 5. The Court erred in refusing to set aside the verdict of the jury upon the grounds that it was grossly excessive and to award a new trial upon all issues.

Given under our hands this 10 day of December, 1958.

ALEXANDER H. SANDS
ALEXANDER H. SANDS, JR.
Counsel for Defendants.

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Dep.
page 2 } DR. CHARLES E. TROLAND,
a witness introduced in behalf of the plaintiff, first being duly sworn, deposes as follows:

DIRECT EXAMINATION.

By Mr. George E. Allen, Sr.:

Q. Please state your full name, age, and occupation, Doctor?

A. Charles E. Troland. I am 46 years of age. I am a neurological surgeon. That is surgery of the brain, spinal cord, and nerves. I practice at the Medical College of Virginia, and all the other hospitals in the city

Q. I believe a subpoena was served on you to attend the trial of this case on March 20, 1958?

A. Yes, sir.

Q. And that you communicated with counsel to the effect that you had to be out of town on that date, but that you would be willing to give your deposition to avoid the necessity of your remaining in town or coming back?

A. That's right, sir.

Q. Is it a fact that you will be out of town on that day?

A. Yes, sir.

Dep.
page 3 } Q. Where will you be?

A. Jackson, Mississippi.

Q. Do you mind telling us what business you will be there on?

A. It will be attending a meeting of the Southern Neurosurgical Society.

Q. When will you get back?

A. On Saturday, March 22, in the evening.

Q. To remain here in answer to that summons, I take it, would be almost an impossibility in view of your commitments to that Society?

A. Yes, sir.

Q. Are you a licensed practicing physician in the City of Richmond?

A. Yes, sir.

Q. Where are your offices?

A. At the Medical College Hospital.

Q. Do you practice alone or in association with anyone else?

A. I practice in association with Dr. John Meredith and Dr. Joseph Kell.

Dr. Charles E. Troland.

Q. Are you engaged in any specialty in your profession, and if so, what is it?

A. Neurological surgery.

Dep. page 4 } Q. What is neurological surgery?

A. Surgery of the brain, spinal cord, and nerves.

Q. What training have you had to qualify you for that specialty, Doctor?

Mr. Sands: We will admit the Doctor's qualifications without any question.

Mr. Allen: Notwithstanding that, I would like to have a brief statement of his qualifications so that the jury may better be able to evaluate and give credit to his testimony.

A. I graduated from Johns Hopkins University School of Medicine in 1936. Was a member of the house there at Johns Hopkins Hospital on neurological surgery until joining the armed forces in April, 1942. I was Chief of Neurological Surgery in the Eighteenth General Hospital in the South Pacific in the China-Burma-India theaters, until returning to this country in March of 1955. I was then on the Neurosurgical Service at McGuire Hospital. In December of 1955 I entered into the practice of neurosurgery in Richmond. At the present I am Professor of Clinical Neurological Surgery at the Medical College of Virginia.

Q. Are you the author of any books on the subjects involved in your specialty?

A. I have written numerous papers. I wrote the

Dep. page 5 } neurosurgical section of Horsley and Biggers textbook of "Operative Surgery."

Q. Are you on the teaching staff of any medical school or college?

A. Professor of Clinical Neurological Surgery at the Medical College of Virginia.

Q. How long have you had that position?

A. When I first came to Richmond, I was Associate Professor of Neurological Surgery. And in 1948 I became Professor of Clinical Neurological Surgery.

Q. Did you have occasion to see Clinton S. Jones, a boy about 12 or 13 years old, on account of injuries that he sustained in an automobile accident? And if so, when?

A. Yes, sir. I saw him first briefly on the evening of February 5, 1957, at Johnston-Willis Hospital, at the request of Dr. R. D. Butterworth. I saw him more thoroughly and examined him the following day.

Q. Tell us what your findings were?

Dr. Charles E. Troland.

A. When he was first seen, he was complaining of a great deal of pain in his neck, which necessitated a postponement of a complete examination; but it was obvious that he could not move his left arm or forearm, although he had some movement in his left hand.

He had a great deal of swelling in his neck, particularly on the left side.

Dep. page 6 } Q. What was your diagnosis of the case, Doctor?

A. I thought that he had had either a stretching of the brachial plexus on the left side, or that he had had an evulsion, which is a tearing out of the roots of some of the nerves going to the left arm from his spinal cord itself.

Q. What is the brachial plexus?

A. The brachial plexus is the grouping of nerves that go into the arm on either side, carrying motor power and sensation.

Q. Where do those nerves come from? Where do they begin?

A. They originate in the cervical region of the spinal cord.

Q. Now you referred to stretching or actual evulsion of the cords. What did you mean by evulsion of the cords of the brachial plexus?

A. That means that the nerves or roots have been torn out of the spinal cord itself, whereas stretchinig means that the plexus itself has been stretched.

Q. What was your view of the injury at that time with reference to whether it was serious or not?

A. I thought it was quite serious.

Q. You first saw this boy, I believe, wasn't it on the 7th of February, 1957?

Dep. page 7 } A. No, sir. He was seen previously on the evening of February 5th. It was more completely the following day, February 6, 1957.

Q. Did you find any limitation of movement in the left arm, and if so, to what extent?

A. Yes, sir. When first seen, there was inability to move the left arm or forearm hardly at all. Movements of the shoulder, arm, and forearm were completely absent. There was some power in the wrist and fingers of the left hand.

There was also numbness extending over most of the arm and forearm.

Q. How often have you seen this boy since you first saw him on the evening of February 5, 1957?

Dr. Charles E. Troland.

A. I saw him daily in the hospital for a period of, oh, I would estimate several weeks. Since he has been discharged from the hospital, he has been seen by me on about three diffrent occasions, the last of which was on March 14, of this year.

Q. Have you a memorandum there of a letter written by you on September 2, 1957, to Dr. R. D. Butterworth on the subject? If you have, just refer to it for the purpose of refreshing your memory.

A. Yes, sir.

Q. In your later examinations, that is examinations as late as September 2, 1957, what have you to say with reference to whether there was still a partial evulsion or you were of the opinion that there was a partial evulsion of the left brachial plexus?

Dep. page 8

A. I would still feel it is a partial evulsion, but I still cannot disregard the fact that it might be a stretching, but both of them are equally serious.

Q. What have you to say with reference to the muscles around the shoulder girdle?

A. Muscles there have shown atrophy, which means that they have continued to be paralyzed. At the time of the last examination, they continued to be paralyzed.

Q. When did you last examine this boy?

A. March 14 of this year.

Q. What were your findings as of that date?

A. He had regained a little sensation over his arm and forearm. He continued to have loss of sensation over a great deal of his thumb, index, and middle fingers, and some spotty loss of sensation up over the forearm.

With regard to motor function, he continued to be paralyzed in the deltoid muscle. That is the muscle which enables you to pull your arm out to the side. He continued to have no discernible function in the triceps muscle, which is the one which enables you to extend your forearm on the arm. He had no evidence of inability to extend the thumb or any of the fingers.

Dep. page 9

He had slight power, or some power, in the biceps muscles, which enable you to flex the forearm on the arm. He had relatively good power in the hand muscles, which enable you to grasp things. But he could not extend his wrist at all. He could not pull the thumb out from a neutral position in the hand.

Q. Doctor, could you describe the structures to be con-

Dr. Charles E. Troland.

sidered in the anatomical region of the neck or shoulder in which these nerves and muscles were injured?

A. It was injured in the region known as the supra-clavicular fossa. That is the region just above the clavicle or the collar bone. The nerves come out there. The plexus comes out. And the greater part of this patient's damage was done to what we call the lower cord of the plexus. That supplies principally the nerves going to the deltoid, triceps, and extensor muscles.

Q. How many nerves is the brachial plexus made up of? How many principal nerves?

A. It varies to some degree, but the brachial plexus is made up of nerve roots which arise from approximately the fourth cervical segment in the cord down to the first thoracic segment in the cord.

Q. What is the purpose of these nerves? What purpose do they serve in connection with the muscles?

Dep. page 10 } A. They enable you to move the muscles. They are motor nerves and also carry sensation, or the ability to feel.

Q. When there is loss of use of these nerves, what happens?

A. The arm is paralyzed and numb.

Q. I understand there are a great many nerves in that region. Is that true?

A. Yes, sir.

Q. I am wondering if it would be asking too much of you to list them and tell us those that were injured, and if you want to refresh your memory on that, you may do so?

A. The individual nerves that are injured, that is not the question. It is the brachial plexus itself from which these nerves arise. The brachial plexus is made up after it is formed—it begins to be formed, it goes into three cords.

Now this patient's principal injury, although all of the cords were damaged to some degree, the principal injury is to what is known as the posterior cord, which is made up primarily of the nerve roots coming from the lower cervical and the first thoracic segments in the cord. This is the cord that eventually gives off the axillary nerve, which supplies the deltoid muscle, which enables you to move your arm out

Dep. page 11 } from the side of the body. It eventually forms the radial nerve, which enables you to extend the forearm on the arm, and also to extend the thumb and fingers, and to abduct the thumb. The sensation is carried not very much by this cord, but by the other cords

in the plexus itself. And the evidence that they were injured is in the fact that he still has considerable loss of sensation in his arm and hand.

Q. What have you to say with reference to the temporary or permanent nature of these injuries?

A. I think that his injuries are certainly to a large extent now permanent, his present state. He may show some additional improvement, but I would not expect him to show a great deal of improvement in his present status.

Q. Has enough time elapsed from the date of injury to the present time to enable you to reasonably evaluate the permanency of this injury?

A. Yes, sir. This has been over a year now.

Q. Do you see any chance for any improvement to amount to anything?

A. He may show some slight additional improvement, but I don't think it will be of any major significance, and that his present status is essentially the way he will remain.

Q. Is there anything of an artificial nature that he can wear that will be of any help to him?

Dep. page 12 } A. Yes, sir. He can wear a splint, which he has been wearing, which will enable him to pull his arm up better than he can now, and to extend his arm a little better than he can now.

Q. Has he any power to abduct the shoulder now?

A. No, sir; no, sir.

Q. In order that the jury may know what we mean by "abduct," would you explain that?

A. It means to move the arm and shoulder away from the body.

Q. Has he any power to speak of to control that arm at all?

A. He has very little power. He can pull his forearm up on his arm in this motion of flexing his forearm on his arm, but that muscle is also weak.

Q. Do you know of any surgical procedures that would be likely to help him?

A. If he regains more strength in the plexus of his wrist, it is possible that a muscle transplantation could be given which would give him a somewhat more useful hand, by enabling him to extend his wrist. That, however, I do not believe would be feasible now in view of the general weakness of the muscles around the wrist.

Q. Explain a little more in detail, so that the jury may

Dr. Charles E. Troland.

better understand it, what you mean by a transplantation?

Dep. page 13 } A. If the extensors of the wrist and thumb have been paralyzed, as has been in this case, it is possible to transplant a tendon from the flexor surface of the wrist back into the extensor surface of the wrist; thereby have the muscle that ordinarily is flexing to extend the wrist.

Q. Is that considered a delicate operation, or a difficult operation to be performed by a specialist?

A. It is a delicate operation, yes, sir.

Q. Are there any specialists in Richmond that you think could perform that operation?

A. Yes, sir.

Q. Would you advise it?

A. Not at the present time, no, sir.

Q. Suppose it should develop that it might be performed later, what is your opinion as to the success of it, or how much good it would do him?

A. I think he could obtain some benefit. He could never get a normal or perfectly functioning hand. And unless he regains some additional function in the plexus at the wrist, I don't think it would be of any help.

Q. Do you consider this left arm of this boy, Doctor, what we could call a flail arm?

A. Not entirely, no, sir.

Dep. page 14 } Q. To what extent would you say it is a flail arm?

A. I would say that it is more than 75 per cent a flail arm.

Q. You do not consider the psychological disturbances of this boy, if there be such, in your line or specialty?

A. No, sir.

Q. What type of man would you think would be the man to examine him and tell us about that?

A. The psychiatrist.

Q. Doctor, I may not have asked you this. Could you give us in percentages the percentage of disability of this boy's arm?

A. Probably 85 to 90 per cent disabled now.

Q. Could you give us your opinion as to the probability of any reduction of that percentage by improvement in the future?

A. I think it is unlikely.

Dr. Charles E. Troland.

CROSS EXAMINATION.

By Mr. Alexander H. Sands, Jr.:

Q. Doctor, I take it that if it becomes feasible in the future to perform such an operation, as you have just described, and the operation is successful, that that would reduce the disability which exists now?

Dep. page 15 } A. Yes, sir.

Q. To some extent?

A. Yes, sir.

Q. I believe you saw the patient the day of the accident, did you not, sir?

A. Yes, sir; on that evening.

Q. Were there any bones injured, any bone injuries of any character that you ascertained?

A. I frankly do not have a record of it. I don't remember right now.

Q. But x-rays were taken?

A. Yes, sir; x-rays were taken. They were taken particularly of that area, but did not show any neck injury.

Q. In all probability if there had been any bone injury, that would be a part of your records, I assume.

A. Yes, sir.

Q. As of the present time, would you say that the muscles which flex his fingers into the palm of the hand are fairly good?

A. Yes, sir.

Q. Now there are two sets of these muscles, as I understand it, for each finger. Now are both of those sets fairly good?

A. Yes, sir.

Dep. page 16 } Q. Now the muscles which flex the thumb into the hand, what about those, are they good?

A. The ones which flex into the hand are good, yes, sir.

Q. And the muscles that oppose the thumb to the fingers, what about those, are they good?

A. Yes, sir.

Q. Now the palmaris. Tell us then what the palmaris is?

A. The palmaris longus is a tendon really, mainly, which goes into the fascia of the hand, and tightens up the fascia of the hand itself.

Q. What about that with reference to this arm, is that good?

Dr. Charles E. Troland.

A. Yes, sir.

Q. Now the muscles that raise the shoulder-blade or the scapula, what about those?

A. The ones which raise the shoulder blade are functioning, yes, sir.

Q. And I believe the sensation in the arm you have already described, I believe, when you stated that there had been some improvement in the sensation in the forearm since you originally saw him, is that correct?

A. Yes, sir.

Dep. page 17 } Q. What about the flexibility of the joints themselves?

A. The joints have been kept very mobile and supple by constant attention and physio-therapy and by his mother.

Q. Would you say the amount of muscle in the shoulder blade apears sufficient to raise the arm?

A. I would say he can raise—not in the shoulder blade, for that has very little to do with the arm—he cannot raise, he cannot abduct his arm, which means he cannot pull it out to the side at all.

Q. I believe you said that he could raise it?

A. He can raise it to some extent by means of flexing the forearm on the arm. He can pull his arm up, which is a function of the biceps muscle primarily, which does have some power.

Q. I believe, if I understood you correctly, Dr. Troland, at the present time you would not recommend any operation looking to rehabilitation because of his present condition, but that if the function in the plexus of the wrist—is that the right word, sir?

A. Yes, sir.

Q. —if that does improve, then an operation of the sort that you mentioned might be indicated at that time?

A. Yes, sir.

Dep. page 18 } Q. And if that operation should become indicated and should be performed, and should be successful, it would, in your opinion, increase the use of this arm to some extent, but to what extent is problematical, and you cannot say, is that correct, sir?

A. Yes, sir. To increase the use of the hand, yes.

Marvin A. Fellers.

RE-DIRECT EXAMINATION.

By Mr. Allen:

Q. With reference to the operation referred to in the question by Mr. Sands, would that improve the use of the hand and fingers somewhat, and not the entire arm?

A. Yes, sir. The benefit from such an operation would be entirely confined to the hand.

Q. Mr. Sands asked you about the muscles that are good. Conversely, may I ask you to list the various muscles which are paralyzed.

A. The deltoid muscle is paralyzed. The triceps, the extensor—that is the long extensors of the wrist, the extensors of the fingers, and the long abductor of the thumb.

Q. Were those that you just mentioned in the hand or do they deal with the arm also?

A. They deal primarily with the arm, although, of course, the extensors of the fingers deal with the hand.

And further this deponent saith not.

(Signature Waived.)

* * * * *

page 4 } MARVIN A. FELLERS,

a defendant, called as an adverse party, first being duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Allen:

Q. I believe your name is Marvin A. Fellers, is that correct?

A. That is correct, sir.

Q. How old are you?

A. 41.

Q. What is your occupation?

A. I am president and manager of an aluminum window and door corporation.

Q. You are President and Manager of that company. On the occasion of this accident where had you been?

A. I had been home to dinner and was returning to the office.

Marvin A. Fellers.

Q. Returning to the office to go to work for the company?

A. I just had a few details I had to finish that day. I came down to finish them up.

Q. You went back to the office to finish them.

A. Yes.

page 5 } Q. What sort of an automobile were you driving at the time?

A. 1956 Ford.

Q. What was the condition of the weather that night?

A. Well, it was a mist, and foggy at the time of the accident. It started raining a little later more heavily.

Q. Where did this accident happen?

A. It happened on Route 60 about 150 to 200 feet east of the Bon Air Road.

Q. You were traveling in the direction of Richmond, were you?

A. That is right.

Q. That is on the half of the highway going east?

A. That is right; yes, sir.

Q. Route 60 is how many lanes?

A. It is a dual highway. 2 lanes in each direction. There is a driving lane and a passing lane, yes, sir.

Q. Approximately what is the width of the grass plot between the two sections of the highway?

A. I cannot say for sure. I would imagine it is about 12 to 15 feet.

Q. You never have measured it and don't know

page 6 } exactly?

A. No, sir.

Q. You were traveling in the direction of Richmond and away from Midlothian. In what direction was the bicycle traveling?

A. Same direction when I saw it—when I saw it it was coming onto the highway.

Q. How far was it from you when you first saw it?

A. Very close. I would say approximately 30 feet.

Q. There was no intersection there to your right that the boy could have come out of?

A. No, sir.

Q. Did you see him while he was riding along the shoulder?

A. When I first saw him he was on a slight angle coming into the highway standing on his bicycle. He was not sitting on the seat, he was in a standing position.

Q. Riding going along the highway?

A. Well, it happened so fast in 30 feet you don't have time

to do much. In other words, when I saw him he was on this angle (indicating with hands), and I did everything I could to miss him in the time that I had.

Q. Was he on the edge of the highway when you first saw him, or not?

page 7 } A. He was up into the driving lane on an angle coming onto the highway when I first saw him.

Q. Had he gotten both wheels on the highway, or one?

A. Well, just like I said before, in 30 feet both wheels was on the highway when I hit him, of course, because when I first saw him he was coming onto the highway on an angle.

Q. Just coming on the highway?

A. That is right.

Q. On a slight angle?

A. You have to be coming on a slight angle coming on the highway.

Q. How close were you to the right side of the highway at that time?

A. I imagine possibly three feet—two to three feet from the edge of the surface.

Q. You didn't see him until you were within what distance of him?

A. About 30 feet.

Q. You recall answering interrogatories and saying that the distance that you saw him was from 20 to 30 feet?

A. Well, I used a maximum figure there, from 20 to 30 feet. It is hard to determine exactly to the exact foot.

page 8 } Q. At any rate, you were so close that it was difficult for you to tell?

A. That is right.

Q. How far it was and exactly where it was?

A. I know he was on the highway.

Q. And what lights he had on?

A. I didn't see any lights at all.

Q. You do not say they were not there; all you can say is you didn't see them?

A. I didn't see them before the accident or after the accident.

Q. What part of your automobile struck the bicycle?

A. The extreme right side of the bumper just where it makes the turn.

Q. How far from the end of the bumper, do you think?

A. Three inches.

Q. And what part of the bicycle did it strike?

A. The rear wheel.

Marvin A. Fellers.

Q. You were traveling how fast, did you say?
A. Approximately 45.
Q. You didn't see the boy in time to even apply your brakes, did you?
A. That is right.
Q. Did you have an automobile equipped with
page 9 } standard brakes?
A. That is right.
Q. Adequate to control its movements?
A. Yes, sir.
Q. Were they in good order?
A. Perfect.
Q. Along there that night as the road was at that time and with the brakes you had, and in good order, and the condition of the road, within what distance do you think you could have stopped if you had seen some object ahead of you in time to have applied your brakes?
A. Well, I had new tires on the car. It should have been able to stop, which I did after I struck him, in about 25 to 30 feet.
Q. Do you think if you could have seen him in time you could have stopped within 20 to 30 feet?
A. 20 to 50 feet.
Q. If you could have seen him in time could you have turned to the left?
A. Oh, yes, I am sure I could have if I had seen him in time.
Q. Did you turn to the left?
A. Like I said, I didn't see him in time to actually do anything.
Q. And if you had seen him in time you could
page 10 } have blown your horn?
A. That is true.
Q. To warn him you were coming, but you didn't see him in time to blow your horn?
A. That is right.
Q. You of course were not intending to pass him because you didn't see him?
A. That is right.
Q. How far did you say you were driving from the right-hand edge of the highway when you first saw him?
A. I would say from two to three feet.
Q. What sort of a lighting equipment did you have on your car? Did you have both a low beam and a high beam?

Marvin A. Fellers.

A. That is right. I was driving on low beam at the particular time because traffic was, is extremely heavy.

Q. Were your lights in good condition for operating, up to standard?

A. That is right.

Q. Well now, operating on the low beam your lights, if you are looking ahead how far can you see in view of the weather you had that night?

page 11 } A. You are supposed to be able to see about 100 feet. I would say the visibility was cut approximately fifty per cent on that particular night.

Q. Do you know whether or not you can see further if you are operating on high beam?

A. Well, it is hard to say in weather conditions. Sometimes you can see better actually on low beam, depending on the fog.

Q. Is it not true that if you are operating on low beam your light is distributed over a wider area? In other words, you can see more on the shoulder of the road if you are driving along within a few feet of the highway?

A. The lights are equipped to move to the right on a low beam, but that is also just to distribute the light 100 feet over a hundred foot visibility that you are supposed to see. So right back close to the car it doesn't make much difference.

Q. What I am asking you is: If you are running on low beam can't you see over a wider space? Isn't your light distributed so you could see more of the shoulder of the road?

A. Actually in the hundred-foot distance that the low beams are supposed to shine they are supposed to throw the light to the shoulder of the road. That is true.

page 12 } Q. Were there any automobiles immediately behind you going in the same direction at the time?

A. Not for a couple or three minutes after this accident happened, didn't a car come along.

Q. Were there any automobiles immediately to your left when you saw this boy?

A. Going in my direction?

Q. Yes.

A. No.

Q. Of course, couldn't any be meeting you on that side because they were not allowed to go west on that side?

A. That is right.

Q. If you had seen this boy on the bicycle riding along on

the shoulder of the road, or on the edge of the hard surface, say within 75 or 100 feet, could you have avoided him then?

A. Sure I could have. All I had to do was cut about three inches or four inches to my left and I would have missed him.

Q. Whose automobile were you driving?

A. It is titled in the name of the Aluminum Window and Door Corp.

Q. In other words, you were driving the company automobile?

A. Yes, sir.

Mr. Allen: That is all we want to ask him now, page 13 } Honor.

The Court: Very well.

Mr. Sands: We will reserve our examination to the proper time.

Witness stood aside.

page 14 } CLINTON S. JONES,

the plaintiff, first being duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Allen:

Q. Little man, will you state your name, please, to the Court?

A. Clinton Stokes Jones.

Q. How old are you?

A. 13.

Q. How old were you at the time of the accident?

A. 12.

Q. Where do you live, little man?

A. Chesterfield County.

Q. How far from Route 60?

A. About an eighth of a mile.

Q. Do you live on the south side of Route 60?

A. Yes, sir.

Q. About an eighth of a mile from 60?

A. Yes, sir.

Q. What grade are you in in school?

A. 6th grade.

Clinton S. Jones.

Q. What grade were you in at the time of the
page 15 } accident?
A. 6th grade.
Q. Did you lose any time to set you back?
A. Yes, sir.
Q. How much were you set back?
A. Set back about half a year.
Q. It is in evidence here that you were riding a bicycle and were involved in an automobile collision on this night?
A. Yes, sir.
Q. How long had you had that bicycle?
A. At least 2 years.
Q. How was it equipped as far as lights are concerned?
A. It was lit—lights were running, and the bicycle was running good.
Q. What kind of light did you have on the front of it?
A. I had a light run by a generator.
Q. How far would that light show ahead?
A. About 13 or 15 feet.
Q. What lights did you have on the back of the bicycle?
A. I had a reflector, and had a back light.
Q. Where was the reflector?
A. It was on the rear of the bicycle.
page 16 } Q. I hand to you what purports to be a reflector and will ask you if the one you had on your bicycle was anything like that?
A. Yes, sir.
Q. Was that the kind of reflector you had on the bicycle?
A. It wasn't rubber, but it was aluminum around here (Indicating).
Q. Aluminum?
A. Yes, sir.
Q. What about the size? Was it about the size of that or larger or smaller?
A. About the same size.
Q. Where was that reflector on your bicycle?
A. On the rear of the bicycle.
Q. On the *wyat?*
A. Rear, the back, on the back fender.
Q. Back fender?
A. Yes, sir.

Mr. Allen: If Your Honor, please, we ask this reflector be received in evidence as Plaintiff Exhibit 1.
The Court: It is so ordered.

Clinton S. Jones.

Note: This reflector is received in evidence, marked and filed as Plaintiff Exhibit 1.

page 17 } Q. What sort of electric light was it that you had on this back of the bicycle?

A. It was runned by a generator.

Q. Where was that light? Where was it placed on the bicycle?

A. It was on this side of the bicycle, right near the axle.

Q. When you say "this side," do you mean the right or the left side?

A. Left side.

Q. Near what?

A. Near the axle.

Q. On a part of the frame?

A. Yes, sir.

Q. Do you know whether that light and the front light was working that night?

A. Yes, sir.

Q. And showing?

A. Yes, sir.

Q. Giving a light?

A. Yes, sir.

Q. How do you know that?

A. For one thing I saw it myself.

Q. What is that?

A. I saw the light myself.

page 18 } Q. You saw it yourself?

A. Yes, sir.

Q. Where had you been that night?

A. I had been to a grocery store about three-fourths of a mile from my house.

Q. Who sent you to the grocery store?

A. My mother.

Q. What did you go there for?

A. A loaf of bread.

Q. Which side of the road is the grocery store on?

A. On the left side.

Q. The same side that you were riding on?

A. Yes, sir.

Q. So you had been to the grocery store?

A. Yes, sir.

Q. And about how far was it from the grocery store that this accident happened?

Clinton S. Jones.

A. It was about half way between the road where I—my house goes down, and to the store.

Q. In other words, you were about half way to the road that you turn to the right?

A. Yes, sir.

Q. What part of the highway were you riding on? Were you riding on the shoulder, or the road or the edge
page 19 } of the road or what?

A. I was riding on the shoulder of the road.

Q. How close to the edge of the hard surface?

A. About a half a foot or foot.

Q. Were you riding straight or turning?

A. I was riding straight.

Q. Did you make any turn at all before you were hit?

A. No, sir.

Q. Did you know the automobile was behind you?

A. No, sir.

A. It didn't blow any horn?

A. No, sir.

Q. What was the first you knew about being hit?

A. I woke up over in the field.

Q. You woke up over in the field?

A. Yes, sir.

Q. Do you know how far you and your bicycle were knocked?

A. No, sir.

Q. What happened to you when you were hit with reference to your shoes, your feet, or how you were hit?

A. My shoes was knocked off my feet, and my arm I couldn't feel it. It was numb.

Q. What about your bicycle? What was done to
page 20 } that? What did the blow do to the bicycle, the lick do to the bicycle?

A. It knocked the front wheel off of it, and the back end was smashed.

Q. About how far were you, if you remember, over in the field or the ditch? About how far were you from the place where you were hit?

A. I cannot remember.

Q. You cannot remember?

A. No, sir.

Q. What part of your body hit the ground when you fell?

A. I think this part hit it because I was laying like this (Indicating shoulder).

Q. You mean your left shoulder?

Clinton S. Jones.

A. Yes, sir.
Q. Did you suffer any pain?
A. Yes, sir.
Q. Immediately or later, or both?
A. Well, when I woke up over in the field.
Q. How long do you think that you were unconscious or asleep or before you woke up?
A. About 3 minutes.
Q. When you woke up then how did you feel?
A. My arm was numb and it was hanging down.
page 21 } I couldn't feel. It just felt like it wasn't there.
Q. Did you suffer any pain then?
A. Yes, sir.
Q. What happened to you? Where did they take you?
A. First I got up and they took me to the car and laid me in the back seat of the station wagon. Then the ambulance came and took me to Johnston-Willis Hospital.
Q. After you got to the hospital did you suffer?
A. Yes, sir.
Q. How much?
A. Oh, I suffered enough for them to give me a shot.
Q. How long now did you suffer pain?
A. About 2 weeks.
Q. Was it bad or just mild pain?
A. It was pretty bad. Not too bad, though.
Q. Do you know how long you stayed in the hospital?
A. 2 weeks and a half.
Q. Then what did you do?
A. Then I went home.
Q. Did your arm hurt you after that?
A. Yes, sir.
Q. How long did it continue to hurt?
A. Continued to hurt about three or four
page 22 } months, about.
Q. Tell us how bad it hurt.
A. One thing I couldn't sleep at night. I had to take some sleeping pills.
Q. Had you ever been sick to amount to anything before?
A. No, sir.
Q. Did you ever have anything in your life, any kind of sickness or disability to affect your engaging in sports such as baseball, football, tennis and—
A. No, sir.
Q. Climbing trees and running and jumping. Could you

do all those things before you were hurt in the accident?

A. Yes, sir.

Q. Did you love sports?

A. Yes, sir.

Q. Could you tell us what you could do with that left arm before you were hurt that you can't do with it now? I asked you to make a list. You can refer to that to refresh your memory if you have the list with you.

A. Mr. Maurice has got it over there.

Q. Tell us now the things that you cannot do with that arm.

A. (Referring to list) I cannot play baseball, basketball, football. In the mornings when I have to put my
page 23 } shoes on I cannot tie them. Like going back on trips through the woods, I cannot build huts.

Q. Did you build huts before you were hurt?

A. Yes, sir.

Q. Did you love to do it?

A. Yes, sir.

Q. Go ahead.

A. Climbing trees, I cannot climb trees.

Q. Did you climb trees before you were hurt?

A. Yes, sir.

Q. Did you have fun at it?

A. Yes, sir.

Q. Go ahead.

Mr. Sands, Jr.: If Your Honor, please, I have not objected before because I thought a lot of latitude ought to be allowed in examining a child, but I think counsel is leading the witness too much.

The Court: I believe that is so, Mr. Allen.

Q. Just go ahead and tell us everything, referring to the list you made yourself.

A. I cannot hold books in my hand. I cannot open doors on cars or open the door when I got smething in my hand. I cannot put my socks on in the mornings. I cannot ride a bicycle any more, and I cannot pick up a ball like football or something like that. Like if I walked up to
page 24 } the grocery store I cannot give change to anybody there.

Q. I see.

A. And in eating I cannot use that hand for nothing. If I am eating or lifting up a fork or something like that.

Clinton S. Jones.

Q. And—

A. And when I am carrying drinks to the store, then I cannot carry drinks to the store.

I cannot play marbles any more. I cannot carry flowers to school or pick flowers like I used to do before this.

Q. You are talking about what you can't do with the left hand?

A. Yes, sir.

Q. The left hand.

A. And I cannot run with that. I cannot now hold the ruler down to the desk to draw a straight line when I am drawing, or on a scale. I cannot fight. I cannot wash with my hand. I cannot put my clothes on, my coat or anything.

Q. How about a sweater? When you put one on, tell us about that.

A. No, sir, I cannot put that on, either. I cannot go swim-
ming. I just can't do that. I cannot go hunt-
page 25 } ing.

Q. You can't what?

A. I cannot go hunting any more. I cannot go fishing.

Mr. Allen: That is all I want to ask him at this time.

CROSS EXAMINATION.

By Mr. Sands:

Q. Clinton, talking now about the light, those lights on your bicycle: They were not run by batteries, were they?

A. No, sir.

Q. Run by a generator?

A. Yes, sir.

Q. And that generator depends on the turning of the wheels, I believe, didn't it?

A. Yes, sir.

Q. But did it have a little gadget up on the tire, or did the generator—

A. It was on the wheel.

Q. On the wheel. So when the wheel went around it tripped
a little sort of a lever and that turned it? Is that
page 26 } right?

A. Yes, sir.

Q. And so it was dependant on the wheel tripping that lever to keep the lights going, and that is the way they operated?

A. Yes, sir.

Clinton S. Jones.

Q. When did you last look at that rear light on there? You couldn't see your rear light when you were riding along, you had no occasion to look,—that was back of you, wasn't it?

A. Yes, sir.

Q. The rear light?

A. Yes, sir.

Q. When was the last time you looked at that rear light?

A. One thing about it is if the front light did not work then none of them worked. It runs just like a Christmas tree bulbs do,—if one of them don't work then none of them works.

Q. In other words, they all are on the same circuit?

A. Yes, sir.

Q. When was the last time you looked at that to see if the bulb was broken in the back and it wouldn't cut your front light off?

A. No, sir.

Q. When was the last time you looked at that?

page 27 } A. I looked at it every night before I went up there, I looked at it.

Q. You looked at it before you got on your bicycle, but it wasn't lit then?

A. No, sir.

Q. Because it don't run until after you start riding?

A. That is right.

Q. It doesn't light up. So you don't know when you started riding that night whether or not the back one lighted up or not, do you?

A. It worked then. It worked the following day.

Q. It worked the following day?

A. Yes, sir.

Q. Was it still on your bicycle?

A. Yes, sir, it was.

Q. It wasn't broken?

A. No, sir.

Q. How did you try it the next day?

A. I tried it when I got home. It still was running. My brother took the wheel and rolled it hard as he could on the bicycle, and it still worked.

Q. Did you see him do that?

A. Yes, sir.

Q. When was that, the next day?

page 28 } A. No, sir.

Q. When was that?

Clinton S. Jones.

A. That was when I got home.
Q. How long after the accident?
A. It was at least three weeks.
Q. Just before this happened what sort of night was that? Wasn't it pretty dark?
A. It might have been.
Q. It was sort of misty, too?
A. Yes, sir.
Q. Sort of misty or foggy?
A. Yes, sir.
Q. But it wasn't raining at that time?
A. No, sir.
Q. But the road was wet, or was it?
A. Yes, sir.
Q. It had been raining?
A. It had been raining.
Q. I believe you said you were riding on the dirt shoulder, on the dirt part of the shoulder?
A. Yes, sir.
Q. Is there a lot of automobiles that go up and down that road?
A. No, sir.
Q. That is Route 60, is it not?
page 29 } A. Yes, sir.
Q. And usually aren't cars going up and down that road pretty heavily?
A. Yes, sir.
Q. I reckon that is the reason you were riding on the shoulder?
A. Yes, sir.
Q. To be out of the way of the cars on the road, is that right?
A. Yes, sir.
Q. And how long had you been riding on the shoulder? Had you ridden on the shoulder all the way; is that how you were traveling, on the shoulder?
A. Yes, sir.
Q. So you would be off of the hard surface?
A. Yes, sir.
Q. So you wouldn't be in the way of any automobiles?
A. Yes, sir.
Q. And had you ridden any on the hard surface?
A. No, sir.
Q. And you were not on the hard surface when you were hit this time, you were still on the shoulder?

A. I was still on the shoulder.
Q. At that point the shoulder was sort of muddy there, wasn't it? Do you remember they were digging a
page 30 } ditch or something along there?
A. Yes, sir.
Q. So wasn't it muddy upon the shoulder of the road there?
A. No, sir.
Q. It wasn't at that time?
A. No, sir.
Q. No mud?
A. No mud.
Q. That is a long list you have there, Clinton. Who helped you make that list up?
A. I made it myself.
Q. You made it up yourself?
A. Yes, sir.
Q. And you have all the things on there that you say you cannot do with that left arm?
A. Yes, sir.
Q. Some of those things you can do without your left arm?
A. Yes, sir.
Q. But you are sure that you didn't get on the hard surface at all?
A. I am sure.

Mr. Sands: That is all I want to ask him at this
page 31 } time.

* * * * *

page 32 } ROGER L. JONES,
testifying in behalf of the plaintiff, first being duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Allen:
Q. Mr. Jones, will you state your name?
A. Roger Lewis Jones.
Q. How old are you?
A. 37 years old.
Q. What is your occupation?
A. I am a sheet metal welder.

Roger L. Jones.

Q. How long have you been following that occupation?
A. Approximately seven years.
Q. Where do you live?
A. I live on a road out 360 called Ruthers Road.
Q. You live on the South side, I believe, of 60?
A. That is right.
Q. About how far from 60 do you live?
A. I would say about a half a mile.
Q. You are the father of this little boy that was involved in the accident that is under investigation here?
A. Yes, sir, I am.
Q. How old is the boy?
A. At the time he was thirteen years old.

page 33 } Q. Now, about how old was he when the accident happened?
A. 12.

Q. Were you called to the scene of the accident?
A. Yes, sir, I was.
Q. About what time did you get there?
A. I arrived on the scene approximately seven o'clock or five minutes after.
Q. February 5?
A. That is right.
Q. 1957?
A. That is right, yes, sir.
Q. Had any officer gotten there at that time?
A. No, sir.
Q. Where was the boy when you got there?
A. When I arrived on the scene I went down on the other side of the highway and came back and parked my car in front of Mr. Fellers automobile. And I got out and walked back and the boy was laying in Mr. Fellers station wagon on the middle seat.
Q. What was the condition of the boy at that time as far as you could see?
A. Well, he complained of his left arm being numb and he couldn't raise it up. I tried to raise it up, and he said his back and his neck and he was *aching* all over pretty bad.

page 34 } Q. What did you do with the boy then?
A. Well, I got a little impatient and I started to pick him up and then they said no the rescue squad was on the way, so we left him in there until they arrived.
Q. Did you go with him to the hospital?
A. I didn't ride in the rescue truck, but my wife did.

Roger L. Jones.

Q. Did you go to the hospital?
A. Yes, sir. Directly following the ambulance.
Q. What condition was the boy in after you got to the hospital with reference to pain, or not?
A. Well, from what I could see he was in considerable pain.
Q. How long did he stay in the hospital?
A. He was in there two weeks and four or five days, or three days.
Q. Who was the first Doctor that saw him?
A. Dr. Butterworth.
Q. What other Doctor saw him?
A. That night?
Q. Not that night, but later.
A. Dr. Troland, and Dr. Skorapa.
Q. Do you know whether or not Dr. Troland actually saw him that night?
A. I do not think he saw him that night, but I am almost positive it was the next day, next morning that he
page 35 } saw him.
Q. Did you visit the boy frequently while he was in the hospital?
A. Every day.
Q. What about his pain and suffering?
A. I would say that for the first two weeks he was in a great deal of pain.
Q. Let's go back to the scene of the accident. What was the condition of the weather that night when you got there?
A. When I arrived on the scene it was a little misty, but not raining.
Q. Was there any fog?
A. Very little. Some, but not enough to hinder the road.
Q. What would you say about the state of visibility as to whether the weather was such that a man could or could not see any considerable distance on low beam?
A. Well, let's put it this way, Mr. Allen: I have to say my own judgment in this thing. His, I have tested this, I have been over there—

Mr. Sands, Jr: Objection, if Your Honor please.
The Court: The objection is sustained. He
page 36 } can state his observations that he observed on the night of the accident.
Mr. Allen: Suppose he went in there and made observa-

tions on another night exactly like the night of the accident?

The Court: In the absence of the jury he will have to establish the conditions were the same.

Mr. Allen: That is exactly what we were going to do.

Q. Did you make any observation that night with standard lights, high beam or low beam, as to how far you could see on the highway?

A. Well, that night, no, sir, I did not.

Q. Did you go back there later and if so state first what the conditions were. Did you look around that night for the bicycle?

A. I did.

Q. Did you find it?

A. Yes, sir.

Q. Where was it?

A. The bicycle was laying I would say 15 to 20 feet behind Mr. Fellers station wagon with the front wheel knocked off.

The front wheel was laying over on the side of the road.

page 37 } The bicycle was laying on the shoulder, and I picked it up and put it in my car because I wanted to—

Q. Where was the boy lying?

A. In Mr. Fellers station wagon.

Q. How far was the bicycle from the station wagon?

A. I would say approximately 20 feet or maybe a little bit better.

Q. Did you go back down the highway toward the West?

A. Yes, sir.

Q. And look along the highway at all?

A. I did.

Q. What if anything did you see?

A. I could see the tracks of the bicycle where they had come up along the edge of the shoulder. In other words, in the mud. I noticed that particularly because I was looking.

Q. Could you tell the direction that the track, could you tell the direction the bicycle followed according to the track?

A. You mean in the direction of town or away?

Q. Whether it went straight or turned or what?

A. Well, it looked like a normal bicycle would ride, straight. Of course, naturally two wheels are sitting on the bicycle

wouldn't stay in the same track, but you could see where it was on the shoulder of the road.

Q. Not on the hard surface?

page 38 } A. No, sir.

Q. How close to the hard surface?

A. I would say a foot.

Q. Was that shoulder made of a hard material there, or what?

A. You mean off the hard surface? Well, it is approximately hard clay and gravel.

Q. Did you see anything else there, skid marks of either bicycle or automobile or scratches or anything?

A. No, I didn't, no, sir.

Q. All you saw was this?

A. Just the broken bicycle where it was laying.

Q. And the—

A. And the tracks where it went along. I went back and looked for those.

Q. Where were the boy's shoes?

A. One of them was over in the field. The other one if I can remember—I am not exactly sure where they were at. One of them was laying in the ditch, I believe. One of them was laying in the field. They were separated by about ten or 15 feet apart.

Q. How far from the boy? You don't know where the boy was?

A. Didn't know at the time, no, sir.

Q. The boy had been taken up. Yes. Do you

page 39 } know what type bicycle that was?

A. Well, some people call it an English racing type bicycle.

Q. How long had the boy had it?

A. I had bought it for him Christmas. He was hit in February. It was the approximate time would be about a year and four months, 14 months, I would say.

Q. What sort of condition was it in mechanically?

A. Well, when I had looked over it that Saturday before the accident, I looked it over because I always checked them over on Saturdays when I am piddling around.

From what I could see the bicycle was in perfect condition, good.

Q. What sort of lighting *arrangment* did it have?

A. Well, it has a generator type driven power plant on there that derives its power from the motion of the wheel. It is wound in series. In other words, I will put it this way:

Roger L. Jones.

If one light goes out they will all go out. They both have to be operating to operate each other.

And the tailight is approximately 2 inches in diameter. The reflector is about the same.

Q. Where was the reflector on the bicycle?

A. There is a guard that comes around from the axle to hold the fender straight. This is attached to it between the guard and the fender.

page 40 } Q. Is that the electric light?

A. That is the reflector.

Q. Where was the little red thing that was introduced in evidence here? That is, the reflector.

A. That is the reflector, yes, sir. What they call the reflector.

Q. What was on the fender of the bicycle in the way of light?

A. Well, there wasn't any light on the fender. The taillight is located on the frame that holds the axle in place. It has got clamps that holds it so that it will stay in place.

Q. Do you know whether those lights were working the last time you examined the bicycle?

A. They were, yes, sir, I know that.

Q. How about that night after the wreck? Could you tell anything about the light?

A. That night I didn't fool with the bicycle at all. I didn't even—just put it in the car and put the trunk down on it. And left it in there until I got back home.

Then the next day I checked them, the wires were pulled loose from the rear light, but the front light was still connected. So I checked the wires, connected the wires back together and tried the wheel, and the lights were alright.

page 41 } The bulbs were still in, but it had knocked the glass out of the reflector on the rear taillight. They were both smashed, but I have part of it there.

Q. Did you have any conversation that night with Mr. Fellers?

A. Yes, sir.

Q. If so what was it?

A. I did. Well, when Mr. Fellers—I will put it this way: Mr. Allen came down to the house and told me one of my boys had been hit on the bicycle.

Q. That is the Mr. Allen who runs the filling station?

A. Yes, sir.

Q. It wasn't myself?

A. So the wife and I jumped in the car as fast as we could,

and we went up there, and the first thing I think I was looking at the boy to check him over. Then I asked Mr. Fellers, I was a little rude at the time, but anyway I asked Mr. Fellers why he hit him, and he said he didn't see him.

Q. Did he make any other explanation at all?

A. No, sir.

By the Court:

Q. What the generator attached to? Is it attached to the wheel or the sprocket?

A. Your Honor, some of them are attached to—

Q. On this particular bicycle, I mean.

page 42 } A. This particular bicycle? This one was made up of the rim itself. In other words, there is an axle that goes through the front wheel, and this made onto the front wheel itself. It is not any disconnected thing or anything like that, it would have to be working.

Q. The turning of the front wheel generates the current?

A. Yes, sir.

Q. Can you coast a bicycle without turning the pedals?

A. This particular type, yes, sir, you can.

Q. And if you were coasting the lights would burn, or not?

A. They would burn because it doesn't have anything to do with the gears. It is all automatic.

The Court: All right.

By Mr. Allen: (Continued)

Q. Mr. Jones, I hand you what purports to be three photographs of the bicycle and will ask you to look at those photographs and tell me if they are the photographs of the bicycle after the accident.

A. Yes, sir. They are the bicycle.

Q. When were those photographs taken?

Mr. Maurice: The date of that, if Your Honor

page 43 } please.

Mr. Sands, Jr.: We raise no point on that, sir.

Mr. Maurice: Made on March 2, 1957.

Q. Where were they taken, and were they taken in your presence?

A. No, sir, I wasn't there. In my wife's presence.

Roger L. Jones.

Mr. Allen: We offer those in evidence, if Your Honor please.

Note: These three photographs are now received in evidence, marked and filed as plaintiff exhibit numbers 2, 3 and 4, respectively.

Q. What became of the bicycle itself, do you have it now?
A. Some of it, yes. Some of it I kept for about 7 months, then I have the front wheel I think, or part of it, left.
The other brother to this boy has a bicycle of a similar type. I let him have part of it here and part of it there. I have a frame and some part left. But most of it I have dismantled it and let them use it.
Q. Had anything been taken off the bicycle between the date of the wreck, immediately after the wreck and the date you took the pictures?
A. No, sir. It wasn't except the broken parts that I couldn't find.
page 44 } Q. I will hand you a photograph of the highway where the accident happened and will ask you if you can identify it as such.
A. Yes, sir, that is the highway.
Q. Now I understand you to say that since this bicycle was photographed the filling station has been built along there and the situation now is quite differently?
A. That is right, yes, sir.

Mr. Allen: We offer this photograph in evidence as plaintiffs exhibit number 5, sir.
The Court: What is this intersection here in this picture? Are you going to examine him further on the picture?
Mr. Allen: Yes, sir. I had a few more questions to ask him, first.
The Court: All right, sir.

Note: This photograph is now received in evidence, marked and filed as plaintiffs exhibit 5.

Q. I hand you another picture of the highway and will ask you to see if you can identify that.

Mr. Sands, Jr: We will stipulate the pictures show the scene as it was at this time. I don't see any use
page 45 } in taking up the time of the witness.
Mr. Allen: All right. It is stipulated these

pictures, plaintiff's exhibits 5 and 6, accurately protray the highway as it existed at the time the accident happened.

Note: This other photograph is now received in evidence, marked and filed as plaintiff Exhibit 6.

Mr. Allen: Both pictures were taken looking East.

Note: By agreement of counsel the witness stands aside temporarily in order that Dr. Butterworth might testify and be excused.

DR. R. D. BUTTERWORTH,
a witness introduced in behalf of the plaintiff, first being duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Allen:
Q. I believe you are Dr. R. D. Butterworth?
A. Yes, sir.
Q. Will you state your profession and place of
page 46 } business?
A. Orthopedic surgeon, 307 Professional Building, Richmond, Virginia.
Q. Are you licensed to practice medicine in Virginia and other states?
A. In Virginia, yes, sir.
Q. Any other states?
A. I haven't kept it up. I used to have it in Maryland and several others.
Q. Do you specialize in any particular branch of Medicine?
A. Orthopedic surgery.
Q. What is orthopedic surgery?
A. It deals mostly with injuries, fractures, muscles, ligaments, and injuries, crippled children, polio myelitis, things of that kind.
Q. Will you give us briefly your qualifications and experience.

Mr. Sands, Jr: If Your Honor please, we will admit the Doctor's qualifications. He is one of the best in the South.
The Court: Then is there any need to go further with that?

Dr. R. D. Butterworth.

Mr. Allen: I think that is sufficient, sir. I don't want to take any more time than necessary.

page 47 } The Court: Then it is admitted Dr. Butterworth is qualified.

Mr. Allen: Did I correctly understand counsel to say he is one of the best in the South?

Mr. Sands, Jr: Yes, sir, as a matter of fact he is mine.

Q. Dr. Butterworth, did you have occasion to treat Clinton S. Jones, the plaintiff in this case?

A. Yes, sir.

Q. When and where did you first see him?

A. I first saw him at the Johnston-Willis Hospital on the fifth of February, 1957.

Q. How did you happen to see him?

A. I was called over there to see the little boy by the House Staff, one of the residents.

Q. Did you examine him that evening?

A. Yes, sir.

Q. What time was it that you first saw him?

A. I do not have a record on that. I know it was after dinner hour. I would say maybe sometime between 6:30 and 8:30.

Q. And do you refer to the dinner meal as the one you eat around 6 or 7 o'clock?

A. Yes, sir, 6:00 o'clock.

page 48 } Q. Where you came from over in Dinwiddie County they didn't call that dinner did they?

A. No.

Q. What were your findings then, Dr. Butterworth?

A. I found that this little fellow had a rather severe injury in this area of his body between his neck and his shoulder.

He had a lot of swelling there. He had a marked pain in his arm, and he had lost the use of that arm, almost completely at that time.

Q. What was causing that trouble with him?

A. You mean—

Q. What was the exact trouble?

A. I didn't get that question.

Q. What parts were injured?

A. Oh, he had injured I felt after my examination his brachial plexus. The brachial plexus is several nerves which start both in the neck, one coming out between each vertebra, and two below in the chest part. And they kind of join together and form trunks. They had been pulled away, in my

opinion, from the spinal cord, or from where they, away from the spinal cord proper.

Q. Do you think you could explain that better if you saw a standard medical chart? Could you point out the
page 49 } nerves?

A. Yes, I can ponit them out. I don't know how well I can explain it.

Note: Mr. Allen now produces a large chart before the witness.

Q. I exhibit to you the spine and spinal nerves, a chart of them. Is that a standard medical chart?

A. I would say that would be an acceptable one, yes, sir. I don't know what the definition of "standard" would be on that.

Q. Can you point out the brachial plexus on that chart?

A. The brachial plexus, where these nerves here—they are drawn very diagramatically.

Where these nerves join to form what he has let us say on the posterior, outer and inner cords, these nerves here you can see. These are the fifth, sixth, seventh, eighth, here is the first and second. You see this branch coming up here? All of them go through here, and one coming down from there (Indicating on diagram).

That group there is the brachial plexus. That group is the group that goes down the hand, goes down the arm.

Q. You are pointing to the left or the right side on this chart?

A. On this one I would assume that is the right. His was on the left.

page 50 } Q. Are the same ones on the left?

A. Yes, sir.

Q. Do these brachial plexus nerves enter the spinal column or spinal cord?

A. We speak of them as coming from them, actually come from the spinal cord itself, because I think the spinal cord forms first in the embryo, and then they grow out from there. The impulses both come out and go back. That is your communication center.

As they have it drawn up here (Indicating on diagram) this is your spinal cord cut across. That is the way they come in, like that.

Q. What did you find with reference to whether they were torn from the spinal cord?

Dr. R. D. Butterworth.

A. Of course, on this patient we came to that opinion, that they were pulled away because of the type of injury and the type of blow that he had received. Some of these vertebra have been operated on and explored and demonstrated, but nothing could be done for them, except to demonstrate where the pathology really was.

On this one we were assuming that is where it came from (Indicating on diagram), and didn't think that an operation would help him at all and didn't do it.

Q. These nerves constituting the brachial plexus, do they inter-communicate in the base of the neck and the
page 51 } region of the shoulder and travel down the arm?

A. They inter-communicate more just as they come from the spine. In that area between the shoulder and the spine, and once they get out in the arm, going good and proper, they usually single out in three single branches.

Q. Do they carry instructions or impulses to the muscles of the arms from the brain to control the muscular activity? Are they the ones that do that?

Mr. Sands, Jr: If Your Honor please, I object to that line of questioning as being leading.

The Court: It is right leading. You may ask him in a general way to explain what control they have over the muscles, if any.

Mr. Allen: I want to know if they are the ones that control the activity down through the arm.

The Court: That is all right.

Q. Are they?

A. Yes, sir.

Q. These nerves are damaged, assuming that they are, what happens to the muscular activity in the arm?

A. Well, as long as the nerve is damaged there will be no muscular activity. If the nerve is completely damaged and permanently damaged there will be no return of
page 52 } muscular function.

Q. What results when there is no muscular activity?

A. That is what we call paralysis you cannot use it.

Q. When the paralysis happens, what happens to that arm in comparison with the other arm? This boy is 12 years of age.

A. Well, of course his arm being paralyzed and not using it much it will be much smaller than the other one. People

speak of it as withering away, but actually the other one grows and this one looses some in size.

Q. Does it grow at all?

A. It grows a little, but it will be much much smaller than the other one.

Q. Say in years to come how much difference would there be between those two arms, the right arm, the good arm growing, and the other one not growing much?

A. It will be a tremendous amount.

Q. Could you, Dr. Butterworth, by bringing the boy before you and taking off his shirt show us about that, or demonstrate to us what you are talking about?

A. Yes, sir, you can see it, all you have to do is take the shirt off.

Note: At this point the plaintiff comes forward
page 53 } and removes his shirt and the witness demonstrates.

A. (Continuing) Now you see this *aparatus* he has on here is a spring apparatus that helps him move his elbow by squeezing his shoulders. Show them how you do it (speaking to the plaintiff). Now let's take that off.

Note: This harness is now taken off the plaintiff.

A. (Continuing) You can do it faster than I can, can't you? (speaking to the plaintiff)

Now, you can see the difference in the size of his arms. And his shoulder. Just look at it right there. These bones look real prominent, and that looks round and smooth.

Now, bring that arm from your side, way up. You see, he can hold it up not at all. Pull it back across you. Pull it in. Get just a little there. Let me see you bend your elbow. Bend it up like that (Demonstrating on plaintiff). By rolling the arm over that way he can bend that elbow a teeny bit. Bend it up, son, now bend it. But he doesn't have power to bring against gravity. He brings it this way.

Now straighten your hand up like that, like that. And he has some ability to bring his hand up in the air like I am doing now. Hold it up there. Straighten your fingers out. Straighten them out now. Now straighten them out. Close them. Close them now. Now straighten them out. Spread them apart (indicating).

page 54 } We hope by giving him this it will help him. He cannot do this of his own power. He has a little bit. He can turn his arm this way.

Dr. R. D. Butterworth.

He has reflexes here. Bend your wrist down. They are still quite weak. Now bend it down. Of course, that one is there, that is kind of over developed. He is using that one so much.

Q. What have you to say, Dr. Butterworth, with reference to any return of function of that arm?

A. Well, I am very very doubious. I am very doubious of him getting much more function than he has now. Since it has been a year. In a child you won't absolutely give up hope of him getting some more, but I don't see how he can get much more than he has now.

Q. What percentage of disability in that arm would you rate him?

A. It is hard to rate. I roughly estimate that even after he reaches his best he would have about an 80% loss, a 20% arm. And I think that is probably rating it a little high as of today.

Q. Could you state whether he is better off with or without the arm in the situation it is in?

A. Well, right now I would say he is better with his arm because he is still hoping and we are still hoping he may get some return, and there is always a lot of thought page 55 } that it is better for people to keep a member like that even though it is of no value to them actually so far as working is concerned. They just don't like to get rid of it. So you would have to consider first one and then the other.

It is hard to say about that. With that brace that he has and all, it may be of some value to him in certain types of work.

Q. Can you tell us whether he suffered any pain and if so to what extent?

A. This little fellow had a tremendous amount of pain the first 5 or 6 days he was in the hospital. We didn't know at that time whether he was a fellow that could put up with pain or not. But we found out later that he tolerated pain very well, and he would lie in the bed with perspiration kind of running off his head, and we would give him codeine for pain, and he just didn't want you to touch him.

In fact, it was hard to get him to eat at all times. The first few days, 5 or 6 days, he had a lot of pain. Then after that he eased off a little, and of course now he has none, I do not think.

Q. He was in the hospital you say how long?

Dr. R. D. Butterworth.

A. I didn't say exactly how long. I do not have that record with me. I do not have how long he was in the hospital.

Q. I think the testimony is before the jury on that. But I will ask you if up to the time that he left the

page 56 } hospital whether he still had some pain or not?

A. Well, he had gotten down into the stage we speak of as discomfort rather then pain. First few days he actually had pain, real pain.

Q. Have you seen him and examined him recently?

A. Yes. You mean just before today?

Q. Yes.

A. Yes, I saw him on the tenth of March.

Q. What were your findings as of that date?

A. Just about the same. I don't see where he improved much if any. He just has gotten his prosthesis, to aid, him.

Q. That thing he is wearing on his arm?

A. That spring. He rubs his shoulders in bringing it up, it rubbed his shoulders, that spring did.

Q. How long do you anticipate he will have to wear that?

A. We don't know whether that muscle is coming back in there or not. As you saw he couldn't bend his arm if he had to hold it against gravity. But if he could turn it up this way, and kind of swing it he could bend it. He had that much. Whether he will improve or not enough to pull it against gravity I don't know. That is speculative.

Q. What is the significance of the pain in the root of the neck and the arm in the early stages as you have testified?

A. That showed that he didn't have absolute

page 57 } complete paralysis. As he shows today he can wiggle some fingers and wiggle his hand a little bit. If it had been total and complete he would have had no feeling.

Q. Is there any operation that you know of that can be *preformed* that might help this boy?

A. At the present time? No, sir. No, sir, I do not believe he has any right now that could help him.

Q. Any hope for him in the future along that line?

A. There is always hope. If the muscles that he has were to get strong enough you could transfer two of them to the back of his hand to pull it up. But they are weak at the present time and everytime you transfer a muscle which pulls in one direction to try to make it pull in another direction you lose a lot of power in that muscle. So you have to have a strong muscle to transfer. You cannot transfer a weak muscle.

Dr. R. D. Butterworth.

Q. Is there any probability of these nerves constituting the brachial plexus which come out of the spinal cord, and I understand you to say that he had been torn loose there, is there any probability of they ever being re-connected as they were?

A. I would have to say I have never seen one of them re-connect.

Q. If they are not re-connected then what is the
page 58 } result?

A. Just as he is now.

Q. I noticed when you had the boy before you that it was kind of a motion where he was trying to use his shoulder and his body to lift his arm. If he continues to try to do that what affect would it have on his chest cage or his spinal column or the pelvis?

A. I do not think the fact that he tries to lift it will have any. But if he has an imbalance of his muscles he may have some curve in his spine, which is not severe.

In other words, if the big muscle that goes across his chest, which is weak now stays weak, his chest wouldn't expand, wouldn't be as large as it is on the other side.

Q. Dr. Butterworth, have you undertaken any psychiatric studies of this case to enable you to decide whether or not there will be some definite emotional disturbance on account of the residual disability being present?

A. Not on this child, no, sir.

Q. Would that more properly be the work of a neuro-psychiatrist?

A. No, I do not believe this boy will be like that. I think all people who have a rather weak arm or loss of an eye or something like that will have a kind of defensive mechanism, which they learn to live with.

They always fear hurting the other arm or the other eye
or something like that, because they know they
page 59 } only have a second one to use. But this little fellow
is awfully stable, and I believe he will settle off all right.

Q. Suppose this transplanting operation would have been performed, what disability would still remain?

A. Well, I assume that you mean that if his muscle became strong enough to transplant?

Q. Yes.

A. And then the operation were successful?

Q. Yes.

A. He would be able to get his wrist up like this (indi-

cating). Then if you get your wrist up like that you can grip. But with your hand down like that he has lost his grip.

Q. Would it help the rest of his arm and shoulder?

A. Would it help that? No.

Q. Did you call Dr. Troland in on the case?

A. Yes, sir.

Q. And do you know whether or not he has been continuing to see the boy?

A. Yes, sir.

Q. What is Dr. Troland's speciality?

A. Neuro-surgery.

Mr. Allen: That is all I have to ask the witness.

page 60 } CROSS EXAMINATION.

By Mr. Sands, Jr:

Q. I take it from your answer to Mr. Allen's question of a few moments ago relating to any psychological disturbance that might be involved, in view of your experience with this boy and your treatment of him, and your observations of his response to pain and his other reactions that you think he is pretty stable kind of a boy, and you don't think that there is going to develop any material affect from a psychological standpoint on him particularly, is that right?

A. That is right. The only thing, as I said, if this arm is static, stays pretty horribly disabled as it is, he will always have somewhat of a fear of hurting his other one.

Q. But outside of that you wouldn't expect any emotional disturbance?

A. No, sir. He is a pretty solid fellow.

Q. You have explained to us about the hand, let's talk about the hand. This transplantation. Those muscles have improved, have they not, sir, to some extent since the date of the accident?

A. They appear to be better controlled, that he handles them better, and if they may be a little bit stronger.

Q. And there is a possibility at least that that *improvment* will continue to some extent, as far as the muscles

page 61 } are concerned?

A. To some extent.

Q. Should they reach the point that the transplantation is deemed feasible, it is a fact, is it not, sir, that the tendons can be transplanted and attached to these fingers to give him

Dr. R. D. Butterworth.

the outward, as far as his fingers are concerned, movement that he now lacks; is that correct?

A. That is right.

Q. And the same thing as to the thumb?

A. That is right.

Q. And that would depend in turn on these muscles strengthening to the point that that would be feasible?

A. That is right.

Q. Is it also true, Dr. Butterworth, that that same type transplantation of a ligament could be made to the upper part of this arm to also give him movement this way, and more extent in that movement?

A. Yes. If you have a powerful muscle in the forearm you could take a person like yourself with a good grip and can move those muscles up here and get flection (Indicating on the body).

Q. And that would depend—

A. The question you asked me is would moving these affect the elbow? Not your last question, but the ques-
page 62 } tion before?

Q. That is right, but I am speaking now about improvement, now. Depending on his improvement there is a similar operation that could also give more improvement?

A. That is right.

Q. With reference to the movement of the arm itself, have you considered the possibility or feasibility of fusing the shoulder, left shoulder, and that would enable him to use his shoulders muscles, or, to put it differently: Look at me for a second. He can raise his shoulder now?

A. He can control his shoulder.

Q. If that shoulder were fused, is it not a fact that he could use that muscle to motivate that arm?

A. To gain a little abduction, that is right. Get away from his body a little bit, that is right.

Q. And there again of course that would depend on the decision related to the development that he might show, and may I ask you this: Is it not a fact that his youth and his attitude so to speak is tremendously in his favor? In other words, isn't that true?

A. That is right.

Q. Much more so than in an older person your age or mine?

A. That is right.

Q. And I take it that the percentage of disability that would

page 63 } exist, assuming these operations that we have been talking about were successfully performed, the percentage at which his present disability would be reduced is pretty problematical at this stage, it would depend to a large extent on the success of those operations, wouldn't it, sir, and the extent of the success?

A. Yes, or whether or not you can do them. In other words, I think it would be foolish to do his shoulder now to get the hand up there that is no good after he gets it up there.

Q. Then one is dependent on the other in that operation?

A. That is right.

Mr. Sands, Jr: I have no further questions.

RE-DIRECT EXAMINATION.

By Mr. Allen:

Q. These operations that Mr. Sands is asking you about, are they delicate operations or not?

A. Not so very delicate. The main requirement is to have good muscles to transplant.

Q. Does he have those good muscles now to transplant?

A. No, sir, not now.

page 64 } Q. Have you any assurance from your examination of the boy and what you know that he will have them in the future?

A. No, sir.

Q. A boy 12 years old, injured as severely as you have testified this boy was injured, does such an injury bring about an emotional or psychiatric impact?

Mr. Sands, Jr: If Your Honor please, he has covered that. The Doctor has answered that question.

The Court: Yes.

Q. I believe you testified that you didn't undertake to make any study along that line?

A. That is true, sir.

Q. You testified about shrugging shoulders. Does he bring any muscles into play in shrugging his shoulders that he didn't bring into play to do that before this accident happened?

A. No. He has to bring them in more violently, and he

does not bring in some that he did before. Let's put it that way.

Mr. Allen: That is all.

Witness stood aside.

page 65 } ROGER L. JONES,
resuming his testimony, testified as follows:

DIRECT EXAMINATION.

By Mr. Allen: (Continued)

Q. Mr. Jones, I hand you what purports to be a memo made by you in reference to measurements of the highway.

A. Yes, sir.

Q. I will ask you to look at it and tell me whether or not you made it?

A. I did.

Q. You made the measurements that are recorded there?

A. That is right.

Q. Tell us the width of the east bound lanes of that highway where the accident happened.

A. The width of the east bound highway is 22 feet wide.

Q. The 2 lanes?

A. That is the road. That is from the dividing strip. That is the tarred section.

Q. It is both lanes going east?

A. That is right. That is two of them; that is both of them.

page 66 } Q. And they are 22 feet wide?

A. That is right.

Q. What is the type of highway there, the type of the hard surface?

A. It is a dual asphalt.

Q. What type of shoulder is there?

A. It is a dividing strip grass plot in the center there.

Q. The right shoulder going east, what type of shoulder is that?

A. It is sort of a gravel dirt shoulder.

Q. Gravel and dirt?

A. Yes, sir.

Q. How wide is that shoulder?

A. 4 feet.

Roger L. Jones.

Q. How wide is that grass plot between the east bound and west bound lanes, from tar to tar?
A. 39 feet.
Q. 39 feet?
A. Yes, sir.
Q. How wide are the west bound lanes?
A. That is the same, 22 feet.
Q. 22?
A. Yes, sir.
Q. And the shoulder over there?
page 67 } A. That is just about the same, four feet, from what I could measure.

Mr. Allen: We want to qualify him to testify as to the tests he made. I understand Your Honor wanted that done out of the presence of the jury.
The Court: Let me say this to counsel, for I don't know whether counsel recall: When you had the witness on the stand you were getting ready to discuss with the witness Exhibits 5 and 6. I do not know whether you finished or not.
Mr. Allen: I would like to have him indicate on those exhibits about where he saw that bicycle track.
The Court: Let me ask about that.

By the Court:
Q. Was there any normal end to those tracks?
A. Well, from what I could see you could see the tracks come, and from what I could honestly see it looks like the car—
Q. No, not your opinion. Just what you saw.
A. Well, what I could see was where the bicycle was struck and left.
Q. You didn't see the bicycle struck. What did you see upon the ground about the tracks? Did the tracks end a normal course?
page 68 } A. A normal course and the bicycle was over in the ditch.

The Court: We should find out here the end of the bicycle tracks.
Mr. Allen: That is right, sir.
Q. Can you point out to the jury where the bicycle tracks came to a end (Indicating on photograph)?
A. Let me see—

Roger L. Jones.

By Mr. Allen:
Q. That picture is looking east.
A. Yes, I see it.

By the Court:
Q. Turn it around and let me see it.
A. Here (Indicating).

Mr. Allen: Let him put a mark there. You want him to put a mark there?
The Court: I just wanted to see just what the situation was.

Note: Witness now marking on Plaintiff Exhibit 6.

The Court: Let the record show the witness has marked with an X on Plaintiff Exhibit 6.

By Mr. Allen:
Q. That indicates what?
A. Where I saw the bicycle stopped.
page 69 } Q. Where you saw the mark of the tire stop?
A. That is right. When I picked it up.
Q. About how many feet along there did you trace that tire mark up to the point it stopped?
A. I went back about 50 feet back from where the bicycle stopped.
Q. When you got up there and followed the tire mark as far as you could, when the tire mark came to an end which way was the mark pointing when it came to an end? The tire mark, in which direction—

Mr. Sands, Jr: Which end?

Q. (Continued)—the last end east, the eastern end—that is the end toward Richmond where the tire mark stopped, which way was it pointing?
A. Going toward Richmond, east.
Q. What I am getting at is: Was it straight or curved either way?
A. From what I could see it was straight.
Q. Up to the point where it stopped?
A. That is right.
Q. Did you look at it good?
A. I did. Made a point to look at it.

Roger L. Jones.

Q. You might tell us where the bicycle is.

Mr. Sands, Jr: He might designate that.
The Court: Yes. Mark that with the letter "B."

page 70 } Q. Put the letter "B" on the picture where you found the bicycle.
A. This picture distorts the road. To mark one place it is kind of a little incline. To put that mark on the picture, I do not believe you can make it out.

By the Court:
Q. With regard to the point "X" that you have already placed on the picture, how far east or west did you find the bicycle?
A. I guess about five or six feet, or more.
Q. Which way?
A. From the—
Q. From the point of the accident?
A. That is right.
Q. Whereabouts with respect to the hard surface of the road?
A. Where the bicycle was laying? It was in the ditch.

By Mr. Allen: (Continued)
Q. Where you have put this "X" on Exhibit 6, state whether the road there is level or on an incline, and which way the incline would be.
A. It is a slight incline. Not too much. Just a slight incline facing the east. In other words, going toward Richmond.

page 71 } By the Court:
Q. Uphill or down?
A. Uphill.

By Mr. Allen: (Continued)
Q. How much uphill?
A. I wouldn't say very much. Not enough so you could not see the rest of the road. It is just a slight incline there.
Q. Now, you are looking at Exhibit 5.
A. This is more like it. I can see here just about where that thing was. It is a mailbox there. I would say approximately where that white spot is where I found the bicycle over to the right-hand side.

Roger L. Jones.

Q. Put a "B" over there, then.
A. Yes.

Note: Witness marking "B" on photograph.

Q. Can you put the eastern end of the bicycle track on that picture? Could you locate it on that picture?
A. Well, it was out on this shoulder. That is where the tracks was at. Because I couldn't see them on no tar road.

Mr. Allen: Now we want to bring up the other question, if Your Honor, please, the question I mentioned a moment ago.

* * * * *

page 72 }

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Jury out.

Q. Mr. Jones, did you go to the place where this accident happened on a night some time ago with visibility
page 73 } like it was on the night of the accident, with an automobile with standard low and high beam lights and a boy riding on a bicycle in order to determine how far you could see running on low beam lights?
A. Yes.
Q. State first of all—

Mr. Sands, Jr: Let it be understood that I am reserving the right to make objection to this line of questioning.
The Court: That is understood. I am just allowing counsel to test it out at this point.

Q. State now the conditions that night that you went there. First, about what time of night was it?
A. The approximate time of night was about 8:30 or little later.
Q. What were the conditions with reference to being able to see as compared with the night the accident happened?
A. Well—

Roger L. Jones.

The Court: Let him describe what the weather conditions were.

A. It was pouring down raining. It was last Wednesday night, or last Thursday night. I am not sure which. It was that night it was raining awfully hard, and I wanted to put my mind at ease just what the conditions would page 74 } be. So I ran a test on the same strip that this little boy was hit on. He has a brother that is 15 years old, and I put his bicycle in the trunk of my car and went up there, and parked my car back off the road. I parked the car on the side of the road and let him get on his bicycle without any lights or reflector at all, and ride in front of me about 100 to 200 feet, and I put my low beam lights on and I could see him just as good as day.

By the Court:

Q. Where was he riding?

A. On the shoulder of the road, the way the other boy was riding. And it was pouring down raining at the time. It was really a nasty night out.

He had to wear his raincoat it was so bad. You could see way up the road. The road was good. It was no doubt about the road being fogged or anything, rain coming down like that I would say it was a worse night by far than the night of the accident.

By Mr. Allen: (Continued)

Q. In making the test was anything on the side of the road like a mail box or post or anything by which you could watch the boy and then step it off?

A. There is a paper box, Times-Dispatch delivery box up that road from where I started about 500 to 600 page 75 } feet from where I started riding and watching the boy on the bicycle.

Q. Well now, where was your automobile in the highway?

A. I was on the right-hand side of the highway.

Q. Going east?

A. That is right.

Q. Did you step the distance after you had marked it by some object? Did you step the distance as to how far you could see that boy, that bicycle, on low beam lights?

A. Yes, sir, I did. I stepped it off in long steps, yes, sir.

Roger L. Jones.

Q. How many feet a step?
A. Oh, I would say three hundred feet.
Q. I mean, how many feet did you step at a time?
A. 3 feet to the yard. I stepped a good yard. I stepped it as far as I could step apart, long steps.
Q. How far was it that you could see?
A. Approximately 300 feet or better.
Q. I mean see the boy.
A. Oh, from where I could see the boy?
Q. Yes.
A. I could see him, oh, 500 yards or better on down the road, until he got clean out of sight, in other
page 76 } words.
Q. Come back to a distance of 150 feet. Did you step that distance, say 50 yards?
A. Just like I told you, there is a mail box from where I let him start in riding—there is on that picture there, there is a drive in restaurant, and I let him start in front of me there at that drive in restaurant, and start out and get, oh, I guess 75 or 100 feet in front of me and then I got on my car and followed him, and I slowed down and I could see him go on for at least 300 feet or better on up the road.

By the Court:
Q. How fast were you driving?
A. Oh, I was driving slow, Your Honor, at the time. Just running a test. 20 miles an hour, something like that.

By Mr. Allen: (Continued)
Q. On the night of the accident were any lights on that highway at all along there, electric lights of any kind on that side?
A. On the side of the bicycle, no, but on the opposite side there is an open air theater that has a great deal amount of light on it, and a filling station almost opposite from where the accident occurred. And they have quite a great
page 77 } deal of lights.
Q. Did you notice the difference in your high beam lights and your low beam lights that night, in making that test?
A. Yes, sir. The high beam lights have a tendency to shine straight in front of you. In other words, they are more or less covering the main highway, where your low beam lights will switch off to your right approximately 150 feet or better.

In other words, my lights on my car cover the whole right-hand side of the ditch, shoulder and all.

Q. On low beam?

A. On low beam.

Mr. Allen: That is all.

The Court: I rule the evidence is inadmissible.

Mr. Allen: We save the point, if Your Honor, please. We think the test was made under similar conditions, and we have a right to introduce it, sir.

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page 78 }

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Jury in.

ROGER L. JONES,
resuming his testimony, as follows:

CROSS EXAMINATION.

By Mr. Sands, Jr.:

Q. Mr. Jones, at the time that you went down right after the accident to the scene of the accident, I believe you stated that there was mud on the shoulder, is that correct?

A. Well, it was damp, yes, sir.

Q. So that you could see the tire marks of the bicycle on there?

A. Yes, sir.

Q. Talking for a minute about the light on the bicycle. I believe you said these two lights were hitched on the same circuit, so to speak, and they worked by a generator?

A. That is right.

Q. Am I correct in saying that that works sort
page 79 } of like these old T-model Fords, the slower you go the dimmer the light gets, and as you speed up the light gets brighter?

A. In other words, it will go to a maximum, you see.

Q. You mean it will go out completely if the bicycle is stopped, but it always burns a little—

A. It will burn a little bit if the wheel turns.

Q. And the faster the wheel goes the brighter it gets?

Roger L. Jones.

A. Yes, sir.

Q. I believe also you did say that this road slanted uphill at the scene?

A. Yes, sir. It has a certain degree of upgrade there.

Q. The next day you stated that the wires had been pulled loose, but that you hitched it back up and tested it again the next day. How did you make this test?

A. Well, I put the wheel back in the front sprocket, in other words, and after that the tail light was the only one that was loose. Evidently the force of the blow took it. I connected those 2 wires back together and I spun the wheel like that, and the light came on all right. The bulb burned, but the red part had been knocked out. It looked like it

page 80 } had been broken or had been knocked out. But the bulb itself burned.

Q. This reflector that you were talking about on the rear, was any part of that left on the fender of the bicycle?

A. If I recall, the frame part holds the reflector itself was gone, but the little screw that holds the reflector onto the fender was still there, but the reflector was knocked off.

Q. The glass and metal were both gone?

A. Yes, sir.

Q. Can you tell us approximately—I know you have put an "X" mark on that picture as to where the tire marks ended. As I understood you to say, they were going straight ahead when they did end. Are you positive of that?

A. Yes, sir.

Q. At the point they ended, how far were those tire marks from the hard surface?

A. It looked to me like they were right on the dirt, right in the dirt. Looked like they were still in the dirt. You could still see where it looked like they crumpled up.

Q. I think probably you misunderstood my question. Here is the hard surface going along here where the edge of my hand is (Indicating to the witness). Here is the dirt shoulder over here.

page 81 } A. That is right.

Q. Those marks were in the dirt or mud, or whatever it was there, the bicycle marks?

A. Yes, sir.

Q. How far were those marks from the macadam part of the hard surface?

A. About a foot. Looked like about a foot, to me.

Q. You said the bicycle went in the ditch. Could you give

us approximately how far the bicycle was from the hard surface?

A. Let's see. That shoulder there is 4 foot. That ditch is about 2 foot. It is kind of slanted down like this. The bicycle was laying in the ditch. I would say at least 6 feet or more. I do not mean from the impact, now, I mean over.

Q. I mean directly out from the hard surface of the road.

A. From where they left off the tracks?

Q. Yes.

A. Oh, I would say at least 7, 8 to 10 feet.

Q. Over in the ditch?

A. In the ditch, yes, sir.

Q. I believe you stated you figured it was about how far, 5, 6 or 7 feet east of where the tire marks

page 82 } ended?

A. That is right. I didn't measure it. I don't know for sure exactly, but that is just approximately the distance.

Mr. Sands, Jr: I have no further questions of the witness.

The Court: Then the witness may stand aside.

Witness stood aside.

EDWARD I. GERSHOWITZ,

a witness introduced in behalf of the plaintiff, first being duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Allen:

Q. Have you been sworn?

A. Yes, sir.

Q. Will you state your name?

A. Edward I. Gershowitz.

Q. Your age?

A. 39.

page 83 } Q. Your occupation?

A. Business representative Sheet Metal Workers, President Richmond Building Trades.

Q. What trade are you familiar with?

A. Well, I am more familiar with the sheet metal worker than any other trade, of course, but I am familiar enough with most of the others that I can follow a man's work or

Edward I. Gershowitz.

follow the progress of the job by seeing what is going on; like that.

Q. Are you sufficiently familiar with them to know the type of men that they will not take in the trades?

A. Yes, sir.

Q. With reference to disability?

A. Yes, sir; I believe so.

Q. Let's assume a boy 12 years old is injured in the brachial plexus nerves of his left shoulder to an extent that he has lost 80 per cent or more of the ability to use that left arm, hand and shoulder.

Can you tell us whether or not he would be accepted in any of the trades that you are familiar with to work in if that condition continues?

A. No, sir, I know of no trade where he could find work that way.

Q. Can you tell us the wage that is paid in those page 84 } trades?

A. Well, they each vary. There isn't much variation, but the wages average between $2.75 an hour through $3.50 an hour. Each of the respective crafts, of course, have their *oen* wage scale.

Q. Could you give it to us on a yearly basis?

A. I would say that the average mechanic would earn $6,000 a year or better, according to the work schedule and work load in the particular area.

CROSS EXAMINATION.

By Mr. Sands, Jr:

Q. The work that you have had reference to I take it is that part of the trade that relates to manual work, isn't that correct, sir, or work with the hands?

A. That is right. They are all of the trades that I am familiar with are in the building description that would have to be of necessity involving a certain amount of manual work.

Q. I take it you would not have reference to a desk position or a desk job or office job, or anything of that type, would you?

A. No. I would not. There are craftsmen that go into the office, but before they get there they have got to have a lot of field experience to understand the situation on the pag 85 } outside.

Q. What would you say as to a man who had 50

per cent use of one arm and the complete use of the other—50 per cent in the left arm, and complete use of his right arm, would he qualify in some if not many instances?

A. I do not honestly think so, because right at the present time I could not think of a single place where in the construction industry a man with limited use of either an arm or leg, or with some defect, could get along.

In fact, from past experience, a man with one eye has been declined certain type work because when and where you have to work, and how you work, you can endanger so many other people.

And a person with a defect, as far as I know, is—well, they kind of shy away from putting them to work on construction jobs.

Q. You are speaking now of construction jobs, are you?

A. Yes, sir. Well, all of the construction industries. I would say about 70 per cent of the work is in actual construction. A portion of it, of course, is in maintenance, or going back into places where there is work that has to be changed, or something of that sort.

But there are always more than one man involved as a rule.

page 86 } Q. Do I understand you then to say that in those trades that you mention that any defect such as the fact a person has only one eye or small defect in an arm or leg would keep a man out?

A. I wouldn't say 100 per cent, no, because I imagine there are extenuating circumstances.

But as far as I know, and from experience that I have had, I have never seen anybody with a defect on a job.

Q. You never have seen a man with 5 per cent disability in his wrist on a job?

A. Oh, five per cent? I thought you meant more. I have more than that in my wrist.

Q. What about 10?

A. I do not know how far 10 per cent would extend. But I do know that I have seen a man on the job that had a stiff knee or stiff ankle, but he was physically able to get around the job and perform his job.

Q. That is the test, is it not?

A. Sir?

Q. Isn't that the test?

A. Yes, but it is difficult to say that any man can perform on a job with one hand, where in many cases it is so difficult to do it with 2.

Q. I didn't ask you but about one hand. I understood you to say that any defect—

A. No, what I said was is they shy away from
page 87 } it. I have seen that.

Q. It is no fixed rule, is it?

A. No, sir.

Q. It depends on the employer in each instance, does it not?

A. I imagine so.

Mr. Sands, Jr: I have no further questions.

Witness stood aside.

page 88 } HAROLD B. BOYD,

a witness introduced in behalf of the plaintiff, first being duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Allen:

Q. Mr. Boyd, will you state your name, please?

A. Harold B. Boyd.

Q. How old are you, sir?

A. 40.

Q. What is your occupation?

A. I am now president of the Virginia State A. F. of L.—C. I. O. I am a pipe fitter or steam fitter, do pipe work as a tradesman.

Q. Are you familiar with the industrial trades?

A. I have worked for the last seven or eight years with the Apprenticeship Division of the United States Department of Labor in the Middle Atlantic, and with all of the building trades and other trades on the apprentice training.

Q. Are you sufficiently familiar with the trades to express an opinion as to whether or not a man who has injured in his left shoulder in the brachial plexus nerves, which

control his left arm, injured to such an extent that
page 89 } his left arm is disabled 80 per cent or more, are

you in a position to say whether or not he could get a job in the trades?

A. Mr. Allen, I think that in experience you see these people taken care of by employers.

Q. You mean where the accident takes place in the employment?

Harold B. Boyd.

A. If it happened on the employment, certainly, there has been a tendency to take care of those employees. But I think in our apprenticeship training program wouldn't take any person in with those disabilities today. The Department of Labor and our apprenticeship programs usually ask for good physically qualified people, most times with high school educations, and people that we know are physically fit to become qualified as a journeyman.

Q. Would they take in a man in the condition this boy is in, as I have described him?

A. I do not think so. That is my personal opinion. If he didn't have any contact previous to his injury.

Mr. Allen: That is all, Mr. Boyd.

CROSS EXAMINATION.

By Mr. Sands, Jr:

Q. The type employment that you have reference to relate largely to manual work, isn't that right, sir?

page 90 } A. Yes, sir.

Q. And is it not a fact that that would depend entirely upon the person doing the employing in each instance and what he wanted and what was available to him?

A. I am sure that there is no fast rule.

Q. There is no hard and fast rule?

A. No hard and fast rule.

Q. And you have seen some men working under some type disability that were a lot better workers in their particular field that they were in than some men that were 100 per cent all right, depending upon their ability, personality and other things, isn't that true?

A. Yes, sir.

RE-DIRECT EXAMINATION.

By Mr. Allen:

Q. I am talking, Mr. Boyd, about the man who had never worked in the trades, and never been an employee, and comes and applies for a job with a disability like this boy has got.

A. I thought I made myself clear. I know of no employer, or know of no apprenticeship group, who do not look at the qualifications enough from the employee to see whether he will qualify and they will examine the applicant applying for

the job, and he usually in all cases must be physi-
page 91 } call fit. He must have a good education.

When we ask the question if a man would hire somebody there is a difference in that than when you start somebody out to learn a trade, that is different from hiring a man that is already in difficulty.

I do not think that any of the apprentice-type programs that I have worked with would take a boy in and try to teach him this type of trade if he had this difficulty to start with, as a young man.

Q. I forgot to ask you what the earnings are in those trades that you have referred to, annual figures, if you can?

A. Well, I have worked as representative now for the last six or seven years in all the labor movement in Virginia, worked with industrial workers, with building trades. Also printing trades.

They run all the way from $4,000.00 up to 7 or 8 or $9,000.00. Very few under $4,000.00.

We do have some that are affiliated with the common labor.

Q. What about a sheet metal worker, could he get in that trade, and what about the pay?

A. Pay of a sheet metal worker? Roughly around $6,000.00, if it is complete employment. And it has been for the last 15 or 18 years around Richmond. Good
page 92 } first-class workers in the trade, that type men have had steady employment.

Q. How about sheet metal welding?

A. I do not think a man could learn welding and handle a torch and do the work he has to do with one hand.

Q. I mean, what about the wages?

A. About the wages?

Q. Yes.

A. It is roughly between five and six thousand dollars a year.

Mr. Allen: That is all.

Witness stood aside.

L. L. RUSTAD,

a witness introduced in behalf of the plaintiff, first being duly sworn, testified as follows:

L. L. Rustad.

DIRECT EXAMINATION.

By Mr. Allen:

Q. Mr. Rustad, would you state your name, please?

A. L. L. Rustad.

Q. How old are you?

page 93 } A. 61.

Q. What is your occupation?

A. Carpenter. I have been representing the carpenters local and have been financial secretary for the past 15 years.

Q. Are you sufficiently familiar with the requirements of that trade to say whether or not a young man with an injury to his arm, left arm, to an extent that he has lost 80 per cent or more use of it would be acceptable in the trade, to begin with?

A. Yes, sir, I am familiar. I know that he could not. I experienced it. I had to lose a year from a trade with a broken arm until I could get strength to use it.

Q. The testimony is here that this boy's injury is permanent to the extent of 80 per cent or more loss of use of that arm, and my question is:

Could he get in any of those trades you are talking about, to begin with?

A. I do not know of any trade in the construction industry where a person who has lost an eye or an arm would be acceptable.

Q. What wages are paid in those trades? Give me on an annual basis, if you can, please.

A. During the past 15 years I think the wages for construction workers would run from possibly a low

page 94 } at $3,600.00 up to $6,000.00. Of course, they are on an hourly basis, and the annual wage is something we can't figure very close.

CROSS EXAMINATION.

By Mr. Sands, Jr:

Q. What would be your thought as to the percentage Mr. Allen has asked you, 80 per cent, what would you say about a man who had full use of one arm and 50 per cent use of the other?

A. He could not work in our trade.

Q. Couldn't be a carpenter at all?

A. Not in construction, no, sir.

Q. I am speaking of being a carpenter and learning the work as a carpenter.

A. I do not know how.

Q. Your doors would be shut to him?

A. Couldn't manipulate tools, he couldn't manipulate himself in climbing and going about the work.

Q. That would depend on the individual to some degree, wouldn't it, sir?

A. How do you mean that?

Q. Wouldn't it depend on a man's will to do something and his go-get-it-tiveness?

A. His production I think would not.

page 95 } Q. Your doors would be shut?

A. The possibility is he could produce some in construction if he had 50 per cent disability, but he would not be able to produce mechanics requirements.

Q. Your doors would be shut to that man?

A. Sir?

Q. Your doors would be shut to that man, a man who is perfectly capable, had 50 per cent use in one arm and excellent use of the other, and was capable and was aggressive, intelligent, you mean to say your doors would be shut to him if he had 50 per cent loss of use in one arm, and he would not be acceptable as a carpenter?

A. I couldn't imagine him being acceptable as a carpenter, no, sir.

Witness stood aside.

GARLAND P. JOHNSON, SR.,
a witness introduced in behalf of the plaintiff, first being duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Allen:

Q. Mr. Johnson, will you state your name,

page 96 } please?

A. Garland P. Johnson, Sr.

Q. What is your occupation?

A. Painter and decorator. Since 1949, I have been business representative of the painting and decorating local union.

Q. Are you familiar with the requirements of the workers in that trade, and could you tell us whether or not a young

man having lost 80 per cent or more use of his left arm would be acceptable in your trade?

A. As an apprentice boy?

Q. Yes.

A. The only thing I could *see* about that would be was his father or somebody a contractor, and through sympathy or something like that, but normally we would require that he be in the best physical condition that he could be in.

Our work is a little more dangerous in climbing and that kind of stuff than most of the other trades.

Q. Of course, if he had been working and was a good worker and was hurt on the job, you would be more lenient with him?

A. I would try to prevail upon the contractor to do it, yes, sir.

Q. Do they have to go through an apprenticeship before you can receive them in the trades at all?

page 97 } A. They register as an apprentice with given contractors, or indentured to the apprenticeship committee, and then they work, most of them in most cases, they work with one contractor until he finishes his trade.

Q. Would he be allowed to register?

A. Not with us, no, sir.

Q. What are the wages in those trades that you have referred to?

A. Well, it would be painting, decorating, paper hanging, sign painting and glass installation. We embrace a lot of trades. I would say yearly from $4,500 to $7,500.00 a year.

Mr. Allen: That is all, sir.

CROSS EXAMINATION.

By Mr. Sands, Jr:

Q. Mr. Johnson, you have heard the other testimony in this case. Do you require a person to be a perfect physical specimen, too, regardless of the man's intelligence or ability?

A. I beg your pardon?

Q. Do you require perfect physical specimens, too?

A. I wouldn't say perfect, no, sir. I wouldn't be qualified to tell you that, sir. Just an oral examination.

page 98 } Q. Where does perfection end? Do you mean to say a man with all of those other capabilities and intelligence and aggressiveness and the use of all

of his faculties except one member, and that member 50 per cent, that he would be disqualified?

A. If it was left to my judgment I would, yes, sir.

Witness stood aside.

NORRIS ROBERT HODGE,

a witness introduced in behalf of the plaintiff, first being duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Allen:

Q. Would you state your name?

A. Norris Robert Hodge.

Q. What is your occupation?

A. At the present time mechanic and bus driver.

Q. For whom do you work?

A. Bon Air Transit.

Q. You live at Bon Air?

A. That is correct.

page 99 } Q. Did you happen to go to the scene of the accident in question the night that this young man here was hurt?

A. I did.

Q. What time did you get there?

A. It was between six and seven o'clock, but I do not know exactly.

Q. What was the condition of the weather when you got there, Mr. Hodge?

A. The weather was and the road conditions were very bad. I mean at that time.

Q. Was it raining or not?

A. Just before that I went over there it had been raining, but at approximately 15 or 20 minutes later it was not. But along about that time it had been raining.

Q. Did you see Mr. Fellers there?

A. Yes, sir, I did.

Q. Do you remember whether or not Mr. Roger Jones was there to the scene at the time?

A. Not at the time, no, sir.

Q. What say?

A. Not at the time that I was there he was not. He came later.

Norris Robert Hodge.

Q. Did you hear Mr. Fellers make any statement about how the accident happened?

page 100 } A. Not at the particular time until Mr. Jones arrived. We had the boy in the stationwagon. He came up, and I would like to say first that Mr. Jones seemingly got the impression I was the man that hit him. I told him that I did not. So it was Mr. Fellers.

He asked him how did he hit him, or why he hit him, and he said he just didn't, you know, see him. He was close on him.

Q. Do you recall how long it was before the State Trooper got there after you got there?

A. I would say offhand about approximately 20 minutes or something like that. I would say from the time if I recall I called, somebody came and asked me to call the Trooper or get some word and get help, I called. I would say offhand about 20 minutes, I would say.

Q. Did any other cars come up before the Trooper got there? Did any other automobiles come along and stop?

A. Not that I recall, I do not believe so. There was one or two, yes. One man there I believe when I got there, standing there, but I do not believe anybody else at that time.

Q. Did many gather while you all were there, many cars come up?

A. Not before the ambulance got there, no.

page 101 } Hadn't too many got there.

Q. After the ambulance got there and before the ambulance left did many cars come up?

A. There were a few. I wouldn't say how many, don't know exactly.

CROSS EXAMINATION.

By Mr. Sands, Jr:

Q. Mr. Hodge, there was nothing there blocking the highway, was there?

A. No, sir.

Q. You do not know how many cars went by and did not stop?

A. Well, at that particular time—you mean after I got to the accident?

Q. How long after the accident did you get there?

A. How long after?

Q. Yes.

Norris Robert Hodge.

A. I would say offhand maybe 10 minutes, because I called and then went over there.

Q. You do not know what passed there before you got there?

A. No, sir.

Q. And when you got there you weren't paying
page 102 } particular attention to the traffic, were you?

A. I really was not. I was trying to help the boy.

Q. You were trying to help the boy?

A. Yes, sir.

Q. You do not know whether cars came by, you do not know whether they came by and didn't stop?

A. To tell you the truth, no.

Q. It was a bad night?

A. It was.

Q. And visibility was bad?

A. Yes, sir.

Mr. Sands, Jr: I have no further questions.

RE-DIRECT EXAMINATION.

By Mr. Allen:

Q. Mr. Hodge, where was Mr. Fellers' car?

A. It was just as best I can recall the right was off of the shoulder of the road. I believe the left was approximately right near the shoulder. I do not recall exactly.

Q. You do not recall exactly?

A. It was near the highway.

Q. On the right side?

page 103 } A. Going east.

Q. Was it over as far as the ditch?

A. Well, the right front end was approximately in the ditch, somewhere near the ditch.

Witness stood aside.

Mr. Allen: If your Honor please, we have here the deposition of Dr. Troland who is out of town. We would like for Mr. Maurice to get in the witness chair, and I will read the questions and let him read the answers to the jury. Probably that may be better.

The Court: Any objection to that procedure?

Mr. Sands, Jr: No, sir.

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page 104 }

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Note: At this point the deposition of Dr. Charles E. Troland is read to the jury, said deposition being filed among the papers herein.

Mr. Allen: If Your Honor please, I would now like to read these interrogatories—

Mr. Sands, Jr: If Your Honor please, I object to that. It would not be proper to read the interrogatories with the defendant himself present, unless it were for the purpose of rebuttal, any more than it would a deposition. What is the purpose?

page 105 } Mr. Allen: Admission against interest. The Supreme Court of Virginia has expressly held that interrogatories propounded by the plaintiff may be read by the plaintiff, but they may not be read by the defendant unless the plaintiff omits to read them, then the defendant may read those.

Mr. Sands, Jr: I do not think they can be read unless they are used to try to impeach the witness. You cannot go over the same ground again. Mr. Allen asked most of these questions verbatim this morning, and he answered them just as he did in the interrogatories.

The Court: What is the purpose of it? You had him on the witness stand. What is the purpose?

Mr. Allen: The purpose is this: These interrogatories were sued out. They were filed in the Clerk's Office, and under the law we have a right to introduce them in evidence. We are not confined to what he says.

page 106 } The Court: What is your purpose for the introduction of this in evidence in view of the fact you did have him on the stand?

Mr. Allen: Just additional evidence. We have a right to introduce that under the law.

The Court: It seems to me they would be only duplication.

Mr. Allen: Maybe some parts would be duplication.

The Court: My understanding of it would be, if you have him on the witness stand and ask him questions, you have a right to ask him any questions that are admissible and relevant, and if he on the stand testifies contradictory to any previous statement that he has made, then the interrogatories

may be used for the purpose of impeachment. You cannot accumulate the evidence like you propose.

Mr. Allen: I beg leave to differ with you, but I am not going to insist on it at this time. I am not waiving my point at all to introduce them after he testifies, and if I am going to waive my right to introduce them by so doing, page 107 } I want to save that point now.

You may rule when that time comes that they are not altogether contradictory, and we will have to be searching through the interrogatories to determine which are contradictory. I do not think that is the law. I think when you sue out interrogatories the plaintiff has a right to introduce them if he wants to. They are sworn to. They are signed and sworn to by the defendant. He has a right to introduce them under the statute, and under the decisions of the Court of Appeals.

The Court: I am going to rule at this time that so much of the interrogatories as are merely cumulative of the testimony you already have elicited from the witness may not be introduced, because they are cumulative. They may be used at this time, or in your rebuttal stage, either one, for the purpose of contradicting any of the evidence.

Mr. Allen: Yes, I will submit to Your Honor's ruling very graciously, but I would like to be thoroughly page 108 } understood that I am not agreeing to that part that we would be ruled out because they are cumulative.

Mr. Sands, Jr: If he wants to use them to contradict what he did say on the witness stand, I have no objection to Mr. Allen reading them.

The Court: I understand.

MRS. MADELINE R. JONES,

a witness introduced in behalf of the plaintiff, first being duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Allen:

Q. Mrs. Jones, will you please state your name?

A. Madelene R. Jones.

Q. I believe you are the mother of this little fellow here?

A. Yes, sir.

Q. Do you recall the occasion of the accident that he became involved in, do you recall the time?

Madeline R. Jones.

A. Not the exact time.

Q. Do you recall the occasion he was hurt and
page 109 } that you went out there?

A. Yes, sir.

Q. Who accompanied you to the scene of the accident? Did you go to the scene of the accident?

A. My husband took me.

Q. You went with your husband?

A. Yes, sir.

Q. Who was there when you and your husband got there?

A. Mr. Fellers was there, and Allen was there.

Q. The filling station man?

A. Yes, sir.

Q. Did the State Trooper arrive before you did, or had he gotten there?

A. Not when I was there.

Q. Did you go with the boy when he went to the hospital?

A. Yes, sir.

Q. Can you tell us to what extent if any he suffered on the way to the hospital?

A. He suffered right much.

Q. Then after he got to the hospital, how about that?

A. He was suffering right much then, too.

Q. Did you see him often while he was in the
page 110 } hospital?

A. Yes, sir. I went two and three times a day. Sometimes twice a day, and then again I would go three times a day.

Q. During the first part of his stay in the hospital, what have you to say about his suffering everytime you went there?

A. Every time I went there he was suffering.

Q. How long did you continue your visits two or three times a day?

A. Sometimes twice a day, and then sometimes three times a day.

Q. For the whole time he was in the hospital you didn't go there that often the whole time, did you?

A. No, sir.

Q. Along toward the last how often did you go?

A. Yes, sir.

Q. How often did you go along toward the last?

A. Once a day at night.

Q. What was the general condition of health of this little fellow before he got involved in the accident?

Madeline R. Jones.

A. All right, as far as I know. Never had been sick.
Q. Had he ever had any illnesses?
A. No, sir.
page 111 } Q. Was he going to school?
A. Yes, sir.
Q. Did he ever miss any time from school before the accident?
A. Not much. Not unless he had a cold or something.
Q. How much time did he lose as a result of the accident?
A. He lost a year, anyhow.
Q. Do you know whether or not he missed a grade on account of the accident?
A. Yes, sir. They put him back a grade.
Q. Do you recall how long he stayed in the hospital?
A. He stayed in the hospital about two weeks and four days, I would say.
Q. What was his condition when you brought him home?
A. He was getting along pretty good, but he still had pains.
Q. How long did the pain continue?
A. Mostly he would suffer from pains at night.
Q. About how long did it continue, if you know, a few months, year or five months or six months or what?
A. I will say about six months.
page 112 } Q. Pain continued about six months?
A. Yes, sir.
Q. Does he have any pains now that you know of?
A. Sometimes, he said.
Q. What sort of boy was this with reference to activity and that sort of thing?
A. Oh, he was active in just about everything that they done.
Q. Did he take part in sports like basketball and baseball?
A. Yes, sir, he played ball. He played basketball.
Q. Did he do any work around the home or the house?
A. Yes, sir. He helped around the house.
Q. Has he been able to do any of those things since the accident?
A. No, sir. Some things he does.
Q. Did you see any difference in him before and since the accident in his general makeup and temperament and so forth?
A. I do not see much difference in him.
Q. How did he happen to go to the store that night?

Madeline R. Jones.

A. I sent him to the store for bread.
page 113 } Q. You sent him for a loaf of bread?
A. Yes, sir.
Q. About what time did he leave home?
A. I would say he left home about six o'clock, somewhere around that time.
Q. What was the condition of the weather when he left home?
A. It had been raining, it was bad, but it had stopped raining when I sent him to the store.
Q. It had stopped then?
A. Yes, sir.
Q. Is he still living at home?
A. Yes, sir.
Q. What is he able to do now?
A. Well, he helps around the house a lot. Doing different little things that he can do.
Q. What difficulties if any does he have in dressing himself and like that?
A. Well, he will do pretty good, but I have to help him in a lot of things.
Q. Could you tell us whether or not he is the type of young fellow who is trying to overcome his difficulties?
A. Yes, sir, he does work at it.
Q. Is he taking any treatment of any kind now?
A. I have to give him that therapy.
page 114 } Q. What is that?
A. Exercises. Exercise that arm. Bring it up and out and everything.
Q. How often do you do that?
A. Every day.
Q. Do you still do that?
A. Yes, sir.
Q. You do?
A. Yes, sir.

Mr. Allen: That is all.

CROSS EXAMINATION.

By Mr. Sands, Jr:
Q. Mrs. Jones, where did Clinton go to school?
A. Old Broad Rock.
Q. Old Broad Rock?
A. Yes, sir.

Madeline R. Jones.

Q. And still goes there?
A. Yes, sir.
Q. What grade is he in?
A. Sixth.
Q. Before this accident what sort of grades had he made?
A. He made fairly good grades.

Q. How do they grade them out there, from one
page 115 } to one hundred, or do they use A's, B's, C's and D's?

A. I think he made average grades.
Q. Do you know how they grade the pupils, the system?
A. His was all right. S's and E's and U's. That is the way they grade them, and he usually gets S's.
Q. What does that mean?
A. That means satisfactory.
Q. E means excellent?
A. Yes, sir.
Q. And U means unsatisfactory?
A. Yes, sir.
Q. So most of his was what, satisfactory?
A. Yes, sir.
Q. Is that right?
A. Yes, sir.
Q. He is a pretty good student?
A. Yes, sir.
Q. And he is a good student now, I take it?
A. Yes, sir.
Q. On this night that you sent him out, Mrs. Jones, did you know at the time you sent him that it was misty and foggy out?
A. Yes, it was misty and foggy.

Q. And did you know he had to go over Route
page 116 } 60 down to the store?

A. Yes, sir.
Q. Did you know that highway was pretty heavily traveled?
A. Yes, sir.
Q. Did you tell him to stay off the hard surface?
A. I certainly did. I have always preached it to him.
Q. Preached it to him not to go on the hard surface?
A. Yes, sir.
Q. And he knew going on the hard surface was dangerous?
A. Yes, sir.

Mr. Sands, Jr: I have no further questions.

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page 117 }

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DR. JACOB J. HLADYS,
a witness introduced in behalf of the plaintiff, first being duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Allen:

Q. Doctor, will you state your name, please?

A. I am Jacob J. Hladys, MD.

Q. How old are you?

A. I am 42 years of age.

Q. Where are you practicing at this time?

A. At the present time I am practicing at 928 West Franklin Street, Richmond, Virginia.

Q. What is your specialty, Dr. Hladys?

A. I specialize in psychiatry and neurology.

Q. What training and experience have you had to qualify you for practicing in this specialty?

A. While I was in the service I was battalion
page 118 } surgeon, and for four and a half years I saw many injuries to the nerves, especially gunshot wounds and schrapnel wounds, with the resulting paralysis to extremities.

After the war was over I decided to take training in neurology and psychiatry, so that January 1, 1950, I started my training at the Veterans Administration Hospital in Richmond, Virginia, and I remained there for four years.

During this time I saw many nerve injury cases. Since it was not too long after the war and they were being sent to our hospital for rehabilitation.

During this time I was in charge of neurology for six months at which time I did all the neurological consultations at a thousand-bed hospital, sat in all the neurosurgical conferences in which there were to be operations on the nerves. Sat in and made recommendations on all the physical rehabilitations. During this time conducted a clinic at the Medical College Hospital.

Q. Where?

A. At the Medical College Hospital.

Q. Where?

A. In Richmond.

Dr. Jacob J. Hladys.

Q. Yes.

A. Here for the students, and also one weekly conference for the staff at the hospital. So that I saw many nerve injuries during this time.

page 119 } Q. Go ahead.

A. And of course in my private practice I continued to treat neurological disorders, and still go to the Medical College of Virginia and see neurological patients.

Q. What is neurology?

A. Neurology is the branch of medicine which is primarily concerned with the diseases, illnesses and injuries of the central nervous system. We can describe the central nervous system as consisting of the brain, the spinal cord, the cranial nerves. They are the nerves that supply the face; the peripheral nerves, which are the nerves in the extremities; also the cordical spinal nerves which are the large tract of nerves which connect the brain with the muscles.

Q. Are you what we call a neuro-psychiatrist?

A. Yes, I am.

Q. What is that, now? What is a neuro-psychiatrist?

A. That means that I have training in neurology and training in psychiatry, so I am a specialist in both fields.

Q. What is psychiatry?

A. That is the study and treatment of emotional and mental illnesses, and I spend one afternoon a week at the Medical College Psychiatric Clinic instructing students in psychiatry, and I have presented many papers on

page 120 } psychiatry to the McGuire Group on the behavior problems of children, and causes of schizophrenia. Different branches of psychology.

I have read a paper to the Virginia Neuro-psychiatric Society on out-patient electric shock treatment.

And I would like to say I pioneered that form of treatment here in Richmond, and also using intravenous barbituate penathol, so that that technique is being used in the private hospitals now.

Prior to my coming it was not done at all, and electric shock treatment was not being practiced in the office.

Q. How long have you been practicing that specialty of neuro-psychiatry?

A. Seven years.

Q. What medical schools did you study in?

A. Well, I took my pre medical training at Richmond from 1934 to 1937, and finished my work in three years. It usually requires four years.

Dr. Jacob J. Hladys.

During that time I was an honor student. Then I went to Hahnemann Medical College, Philadelphia, Pennsylvania.

I would like to say that the leading cardiac surgeon who is doing all these operations on the heart is a Hahnemann graduate, and I am quite proud of him.

page 121 } Q. Did you at our request recently see Clinton S. Jones?

A. Yes, I did.

Q. State when you first saw him and how many times you have seen him altogether.

A. I saw Clinton twice. I saw his parents on the 4th of March. Then I examined Clinton on the 5th of March, and then Monday of this week.

Q. You have seen him three times?

A. Twice.

Q. Did you examine him on each occasion from the standpoint of a neuro-psychiatrist?

A. Yes, I did. I examined him from a psychiatric standpoint and then again from a neurological standpoint.

Q. What were your findings?

A. Well, this boy presents three major problems. The first problem certainly is obvious and a most distressing problem, that is the paralysis he has of his left upper arm.

As he stated "I cannot use my left arm. I cannot bend it. I wish so many times it would get back like it used to be, so I could use it."

He said, "Without the brace my hand just hangs down. I cannot bring my arm up, I cannot bend it."

page 122 } During this time while he was talking about his arm he was crying and depressed and tearful, and was trying to cover up his arm with the jacket sleeve.

He also complained of pain and stinging and numbness and tingling in the left hand and wrist.

In general he complained of inability to use his left arm, pain and numbness in left hand, nerves, insomnia—which is inability to sleep—depression, nail biting, poor memory, feeling of insecurity, and inferiority and feelings of hopelessness.

Q. What were your findings upon your examination of him, your objective findings?

A. Well, I believe we will start off with the neurological findings first.

Q. All right.

A. And discuss that. And then discuss the psychiatric examination. May I use these charts up here?

Dr. Jacob J. Hladys.

Q. Yes, yes, we have a chart.

Note: Counsel now produces chart for the use of the witness.

A. May we have both of them up here?

Note: Another chart is brought around.

A. (Continued) That is upside down. Let's see, we could clip both of them together sort of like that (placing on display stand).

page 123 } Of course, I would like to say first of all I will discuss a little bit about some of the nerves and muscles that are damaged, and then when I bring the boy in you can see from a practical standpoint the actual physical damage.

Now, I would like to start off with how this thing happened. From what I was told this boy was riding a bicycle and was hit by a car—

Mr. Sands, Jr.: If Your Honor please, we object to that. If the witness can tell any history that relates to his findings that is all right, but I do not want him to be going into describing the accident as though he had seen it.

By the Court:

Q. Is it necessary for you to do that?

A. Yes, it would be necessary from the standpoint of trying to explain how he was injured and the damage that was done in the nerve system.

By Mr. Allen: (Continued)

Q. All you are talking about is giving the history of the case?

A. Yes. I started to say that this boy received an injury which threw him in the air with such force that his

page 124 } shoes were thrown off of his feet. Now, apparently when he landed he must have landed on the left side—

Mr. Sands, Jr.: If Your Honor please, we object to what he must have done.

Dr. Jacob J. Hladys.

Q. Tell the history that you got. The Court has held that the doctors can give the history of the case.

Mr. Sands, Jr.: My objection is to the witness' statement he must have done thus and so.

Q. Give the history. Give the history as it came to you.
A. Well, the history was given to me by the parents that this boy had numerous abrasions around the left side of his head, and his clothing was torn severely on the left shoulder, so that I have to assume from that that he apparently struck—

Mr. Sands, Jr.: Objection, if Your Honor please.

A. I have to assume from that—
Q. You may assume that he fell on his left shoulder, that is all the testimony. He fell on his left shoulder.

The Court: You may assume he got a blow on his left shoulder. Whether he fell on it or hit a telephone pole is immaterial to us at this stage.

page 125 } A. I assume he had a blow to his left shoulder, and the reason I feel that he had a severe blow to the shoulder is because in interviewing him he stated that when he got up he had no feeling in his left arm and he could not move the arm.

I did not see this boy after the injury. I just have seen him in the last few weeks. I am sure there is other testimony about what the circumstances or the findings were during that time.

To produce such a paralysis in the left arm, which is this arm here (indicating), this would be the front and this is the rear, would be this arm here (indicating on chart), and getting to the nerves we have to assume that there must have been damage to these groups of nerves which we call the brachial plexus nerves.

You see, these groups of nerves communicate the muscles, which are right here in the left arm, with the brain (indicating on chart).

In other words, the brain gets the impulses that it wants to move the arm, so the brain sends a message by what we call nerves, and these nerves come from the spinal cord, which

Dr. Jacob J. Hladys.

is right here (indicating on chart), and then in the upper arm these messages—I will use the words message instead of impulse—these messages are transmitted through the brachial plexus, this group here, to this entire arm page 126 } (indicating on chart).

Now, what has happened apparently there must have been a violent tearing of the plexus in this area involving the brachial plexus, and is really made up of what we call the 5th cervical, the 6th, 7th, 8th cervical, and 1st throracic nerves. Now, I assume that this was a serious blow to cause a tearing of these nerves in this area, because to the present date this boy is not able to use that arm.

Now, a little bit of description about how these—now, this brachial plexus I can best describe it as the location of the one—this is the anterior view (indicating on chart). This is the anterior view of a person. Now, we call this space right in here the supra-clavicular space. It is right in this space behind the collar bones, these group of nerves as they come from the spinal cord emerge.

Now, this is a very little covering over here. We have skin, fascia, and latissimus muscles, which is very thin. So actually you see there is very little protection to a serious and very important group of nerves right here (indicating on chart).

In this blow I am sure you received evidence that shortly afterwards there was a hematoma. In other words, there was a lot of blood.

The Court: I don't remember any testimony page 127 } of that sort.

Mr. Sands, Jr.: Objection to that, if Your Honor please.

The Court: There has been no testimony of a hematoma. Don't you assume (speaking to the witness) what kind of testimony has been presented in the case. You must use your own testimony.

A. Would it be permissible for me to say that I read it from the records?

The Court: No, because this jury may not have read the records.

A. Excuse me. We will leave that out. At any rate, there was an injury in this area to these nerves. Because this boy

Dr. Jacob J. Hladys.

is not able to use these muscles. This is the left side (indicating). This is the side that is damaged. He has function of this muscle (indicating). That is a muscle that raises the shoulder. You will see in his case he is over-developed, he has over-developed this muscle to make up for these muscles that are paralyzed (indicating). Actually this shoulder is approximately 1 1/2 inches higher than the right. This means that he has over-developed this muscle to try to get some use out of this paralyzed arm.

Now, this is the group of outside muscles. Now, I want to show you a little bit. We take this muscle off, I will come to this muscle later. We have a group of muscles
page 128 } called the supraspinatus, which I will point out to you on the boy, and infraspinatus muscles.

Now, there is a paralysis here of these two muscles because there is an atrophy of these muscles.

Now, these two muscles are supplied by what we call the subscapularis nerve. This comes from the 5th and 6th cervical nerve. You see right here (indicating). So because he is not able to use those two muscles it indicates that there has been damage to these two cervical spinal nerves, because they supply this muscle here and this one here (indicating).

And the supraspinatus muscle is a muscle that elevates the arm, it sort of does this (indicating). And then the infraspinatus muscle, right here, we say externally rotates, it does this (demonstrating), in other words, brings the arm out like that. Neither one of those functions is he able to do. And the function of this nerve, the suprascapular nerve, is to keep this arm by the side of the body.

Now this he is not able to do because his arm just hangs, just hangs down. Just hangs down by gravity. He can swing this left arm forward and backward, but this is done more with the chest muscles and the trapezius, a back muscle. But it is an aimless function. In other words, you couldn't say swing it six inches or eight inches or a foot or two feet.
Forward and back. He uses these muscles up
page 129 } here, and it is an aimless swinging and hanging down of the arm.

Now, we will go on to another group of muscles. These muscles that I am talking about are frequently referred to as muscles of the shoulder, or deltoid, which are right in through here. And up through here (indicating on chart).

Now, he has a paralysis of the trese major muscle which is this one right here. This is the back. This is beneath these two muscles. Here you can see a small portion of it. This

Dr. Jacob J. Hladys.

is the trese major here on the left side. This is the trese major on the right, right side.

Now, this muscle rotates the arm internally, sort of does this (indicating). You will see he won't be able to do that.

Now, we also have another muscle, subscapularis, which I do not see here actually. The best way to describe it is, it is really behind these two muscles (indicating), it is a deeper muscle. This muscle also has a function to bring the shoulder and arm inwardly, this function is lost.

Now, that takes in what we want to talk about. That takes in most of the muscles of the upper portion of the back, which is the supraspinatus and infraspinatus, trese major, and subscapularis. Incidentally, these are all very large muscles, as you can see. This muscle, subscapularis, actually extends completely under here.

page 130 } Still another muscle of the shoulder, and this is really one of the most important muscles of the shoulder, is the deltoid muscle, as you can see here. From the front. This is from the back view (indicating). This muscle helps us to, what we say, abduct the arm. Actually it raises the arm from the side of the body. This is completely lost.

This deltoid nerve muscle is a very large muscle, as you can see, coming down here, coming down here (indicating). This muscle is supplied by the axillary nerve. Which in turn comes from the 5th and 6th cervical nerves. Comes from the brachial plexus, right through here.

In other words, this axillary nerve comes from the 5th, which is right here, and the 6th cervical nerves, you see.

Which further pinpoints damage to the brachial plexus right in this area, because as you see the previous muscles of the shoulder girdle also come from the 5th and 6th cervical nerves. So this very important muscle of the shoulder also arises from the 5th and 6th cervical cord, which means that there is a very serious damage in this area which interferes with the communication between the brain and the muscles of the shoulder and the deltoid muscle.

Now we will go to some of the muscles of the chest. Now, the pectoralis major is a very large muscle as

page 131 } you can see right here. It covers the entire chest. I do not see it on the back here (indicating on chart). Actually it is an anterior muscle. Best described as starting from here along the entire rib border of the chest and inserts in the upper part of the arm.

Dr. Jacob J. Hladys.

Now, this muscle is a muscle that abducts the arm. That means brings the arm in like this (indicating). And with a paralysis of that muscle the patient is unable to touch the opposite shoulder, and he is not able to do that.

And also he is not able to climb a ladder, because that is a muscle that is used in climbing a ladder, and in doing the type of work, shall we say (demonstrating).

Now, this pectoralis muscle serves the nerve supply, and again we come back to the brachial plexus, you see (demonstrating). And it gets its nerve supply from the 6th cervical, 7th and 8th cervical.

In other words, 6th, 7th and 8th. Now, you see, with the other muscles we were just involving the 5th and 6th cervical nerves of the plexus. Now we have added the 7th nerve of the cervical plexus, which means there are three roots. This (demonstrating) is really made up of the central roots of the 6th, 7th and 8th cervical, and 1st throracic.

Now, we will go to another large muscle, latissimus dorsi, which is a back muscle, as you can see here.

page 132 } This muscle comes underneath the armpit and inserts into the arm. This muscle has the function of pulling the arm backward and inward.

In other words, sort of in the motion that we use in swimming, when you bring your arm back and inward. That is the function of this one. Now it is supplied also by the 6th cervical, which is right here, 7th and 8th cervical. Of course, he is not able to use that muscle, so therefore it means that the damage is extensive in the brachial plexus.

This boy does something very peculiar, and you see this many times where there is a complete loss of function in a group of muscles, say in the shoulder girdle and arm. He manages to get his arm up in a peculiar way of using this muscle here, you see, which has a function of raising the shoulder, but he is so developed that he throws it up this way. He throws out the left chest and he is getting deformity of the left chest, and I will show you that.

He is also getting a curvature of the spine to the left. In other words, he is trying to bring that arm up so he throws everything out, and he is using muscles that really should not be used in the function or movement of the arm.

I will demonstrate that when we bring him in.

page 133 } Now, you see there is a complete atrophy of all muscles of the shoulder, which is right here, right here (indicating), and the deltoid and pectoralis major, and therefore it means that there has been dam-

Dr. Jacob J. Hladys.

age and destruction to the 5th, 6th and 7th cervical nerves.

Now, we are getting into another section of the extremity which is the arm, and he has a complete paralysis of all the muscles of the arm, and as you can see right here is the biceps muscle. I am sure you all know that. That is this muscle right here.

Let me see if we have any more here (looking). Yes, and the brachial, or the brachialis anticers, you see, here are the larger muscles, outside muscles (indicating). We remove this muscle here and beneath that muscle are these other muscles.

There is atrophy of this muscle, biceps muscle.

Q. Which?

A. Biceps muscle. There is an atrophy of the left biceps muscle.

Q. What do you mean by atrophy?

A. By atrophy I mean the muscle has lost its function and its use. The muscle has wasted away because there are no more communications going from the brain to the muscle, you see, because the pathway has been interrupted here in the brachial plexus, so that whenever there is an interruption between the nerve and the muscle we always have

page 134 } what we say is atrophy, but what it really means is a wasting away of the muscle.

In other words, the muscle dies and just gets smaller and smaller and smaller, because every muscle to continue to function and to continue to live has to have a nerve supply to the muscle.

And, as I say, there is a complete atrophy of the muscles of the arm, which are the biceps muscles, the brachialis anticers right here—speak of it as the brachialis muscles. And coraco-brachialis, which is right here (indicating).

These three muscles are the main flexers of the arm and forearm. In other words, these muscles help us to do this, you see, help us to do this function (indicating).

Now, these three muscles are supplied by the musculocutaneous nerve. I don't believe you can see it on here. It is sometimes spoken of as the externus. This nerve here (indicating) arises from the 5th and 6th cervical nerves. So you are beginning to see how gradually with all, as you go over these various muscles, more and more we are able to pinpoint the damage to the plexus, you see, by the loss of use of muscles.

Now, there is also to the back of the arm atrophy of the triceps muscle. You see, this is the back right here. Now,

Dr. Jacob J. Hladys.

page 135 } this is the extensor muscle of the forearm. In other words, this is the muscle that when the arm is like this let us say and he tries to bring it down, we call that the large extensor of the back.

Now, we can also further show that there is damage in this biceps muscle by testing the reflex, and it is absent. In other words, there is a reaction when you tap the tendon, there is a movement of the forearm, and that is absent.

And when we tap the triceps tendon back here, that forces the arm backwards. That is absent.

Again, offering further proof of the seriousness of the damage to the brachial plexus.

Continuing on down the arm: We have the radial nerve. That is sometimes spoken of as the musculospiral nerve. Yes, here it is right here (demonstrating). Right here.

This is the musculospiral or radial nerve. This is one of the biggest nerves that come from the brachial plexus. This musculospiral nerve is formed by all of the posterior branches of the 5th, 6th, 7th and 8th and 1st throracic spinal nerves. And we have a complete paralysis of this musculospiral nerve, which is right here, which as you can see arises from practically every branch of the brachial plexus. And the brachial plexus is made up of the 5th anterior branches of

page 136 } the 5th, 6th, 7th and 8th cervical, and 1st throracic, so you see how extensive the damage is through here.

Now, we will follow this musculospiral nerve through the arm. This musculospiral nerve is the nerve that is responsible for all the extension movements.

By extension movements I mean the ability to put the arm backwards like this. In other words, once the arm is in a position like this, then the arm is brought back by the extensor muscles. These are all on the back portion of the forearm of the wrist, of the hand, and of the fingers.

Now, paralysis of this muscle could—paralysis of this musculospiral nerve produces a typical picture we call wrist drop, which this boy has. It is the position in which he is not able to bend his wrist up like that. He is not able to bend his fingers up like that. He is not able to bend his thumb.

So that we see that he has a complete paralysis of his musculospiral nerve because he has lost the ability to extend the muscles of the forearm, the wrist and the hand. And, as I said before, it produces a very definite picture, wrist drop, which I will demonstrate on this board.

Dr. Jacob J. Hladys.

Getting down into the arm, so you can see just briefly summarizing, that all of the large muscles of the shoulder girdle, shoulder, the chest and the arm, are completely paralyzed. I mean, you can see how much terri-
page 137 } tory all these muscles cover.

This boy has no use of these muscles, and will never expect to use these muscles of his arm again.

Now, we are coming into the forearm and into the hand. Now, as I said before, this boy could not extend the wrist. In other words, he could not bend the wrist upward. It hangs just like that, and that indicates that muscle called the extensor carpi radialis longus and brevis are atrophied. In other words, he has lost his function. He is not able to extend his wrist, in other words, he is not able to bend it up.

Now I will see if I can find these muscles here (referring to chart). The extensor carpi radialis longus—and you can see it right here. This muscle comes down along the outer side of the arm, actually, and this muscle is inserted into the 2nd meticarpal phalangial, in other words comes down here and it is inserted right here (indicating).

And this is the muscle that bends the wrist up. He is not able to do that.

Now, there is also a loss of the ability to extend the fingers of the hand. In other words, he is not able to stretch his hand out like this. Fingers are curved like this. He doesn't have that ability to extend his fingers or raise his fingers up.

There is a paralysis of all those muscles.

page 138 } Now, the actual muscles themselves are the extensor digitorum comunis digiti quinti proprius. Let me see if I can see that. (Looking on chart) Here it is, you see. We will be using this chart mostly because most of the muscles that are supplied by the musculospiral nerve comes down the back of the forearm and hand.

In other words, the paralysis is an extension of the forearm, the wrist and fingers of the hand, and here is this muscle I was just talking about, the extensor comunis digitorum, comes down here, as you can see divides and gives a tendon to each one of these fingers. This is a very important muscle of the hand, because this muscle divides in the wrist into four, and it is inserted into it, as you can see right here, the second and third phalanges. Phalanges, this being the middle of your knuckle. So it is inserted in there, and has a very important function of extending the fingers, which is lost.

Dr. Jacob J. Hladys.

This is also paralyzed, paralysis of the extensor digiti quinti proprius. This extends the first phalange of the little finger. Let's see if I can see it here (referring to chart).

No, I do not see this muscle up here. But this muscle comes down, it is the muscle that comes down to the little finger. I do not see it here (referring and pause).

page 139 } Q. Doctor, I do not believe I would go quite that much into detail.

A. I could list the muscles that are damaged. I believe that would be the simplest thing. There is the extensor indices proprius. This goes to the index finger. I just saw that a minute ago (referring to chart).

Q. Just tell us briefly.

A. This finger extends the—this nerve extends the index finger. It does this, you see, raises this finger up.

Q. That muscle is damaged?

A. That muscle is completely atrophied. Then also the extensor pollicus longus.

Q. What is that?

A. This extensor pollicus longus extends the thumb. I believe that should be here. In other words, it does this (indicating).

Q. I see.

A. Extends the thumb. That muscle is paralyzed, too.

Now, as I said, all these muscles I have described to you in this group are muscles that extend the fingers. In other words, they raise the fingers and stretch the fingers. That function is completely lost.

And just, in repetition, I will say that the chief

page 140 } function of the musculospiral nerve, which you have seen here, right here (indicating), the main functions are to extend or stretch the arm. The elbow, the forearm. It raises—you can see it right here. The wrist and the fingers. And this boy has a complete paralysis of this nerve.

In addition to the paralysis of the muscles of the girdle, shoulder and arm.

Q. Are there any muscles left that are of any real value that are not damaged, if there are tell us about that.

A. Well, there are a few muscles in the flexer group. In other words, as you see we are looking at the posterior view of the body, and the extensors are on the posterior portions of the arm. So that getting around to the front portion of of the body the flexers to the fingers are preserved but weak.

In other words, he is able to flex all of his fingers, flex

Dr. Jacob J. Hladys.

his thumb, he is able to oppose the thumb to the little finger. He is able to spread his fingers apart.

However, it is all done in a very peculiar position in the wrist drop. So whatever function he has it is done, he has it in an abnormal position, so that for actual purposes there is really the function that he has in these muscles in this position over here of no useful purpose, because we

page 141 } have to have an interplay of the muscles on the posterior side of the forearm against the muscles on the anterior surface of the forearm.

Now, I would like just briefly to say that as further evidence of damage to the brachial plexus, which has caused the paralysis of the left shoulder, left shoulder girdle, arm, and the damage of the musculospiral nerve, I measured that boy's arm.

Now, the left armpit, right up here, was six inches. The right armpit 9 3/4 inches. Below the left armpit right here was 5 inches. Below the right armpit 8 inches. The middle of the left arm 5 1/2 inches. The middle of the right arm 8 inches. Above the left elbow 5 1/2 inches, and above the right elbow 8 inches.

Below the left elbow 5 1/2 inches, right here, and below the right elbow 8 1/2 inches.

Middle of the left forearm is 4 3/4 inches, and the middle of the right forearm is 7 inches. That is almost 2 1/4 inches difference here in the forearm.

The left wrist is 4 1/4 inches, and the right wrist is 5 1/2 inches.

The left palm is 6 inches, and the right palm is 7 1/2 inches. I measured one of the fingers, the left middle finger right here, was 1 7/8 inches, and the right middle finger was 2 1/8 inches. Measured the left little finger, that was 1 3/8 inches, and the right little finger was 1 6/8 inches.

page 142 } From these measurements we can see there is a very marked atrophy or wasting of all these muscles.

Q. What is the cause of the left arm now getting smaller and the extremities of that arm getting smaller in comparison to the right one?

A. The cause is that these groups of nerves known as the brachial plexus have been damaged and no more are functioning to supply communication and nerve impulses to the muscles. If the muscle loses its nerve supply it dies, it wastes away. Gets smaller. There is no hope of ever changing that condition, because this is a perfectly disabling thing,

because it is impossible to do anything to reconstruct any of the brachial plexus up here.

Therefore, the entire extremity gets smaller and smaller and smaller and smaller and actually in this boy's case when you see him the right arm hangs about three inches below the left arm.

Q. What will that condition be say in 8 or 10 years from now?

A. Well—

Q. Will it get smaller?

A. I am afraid that it will actually continue to get smaller and smaller until there will be no muscles left at all. In this extremity. There will be nothing but connective

page 143 } tissue.

Q. What?

A. Connective tissue with the—

Q. What sort of arm will that leave him with?

A. That will leave a useless arm, and will have a tendency to set up a painful condition, because as you know scar tissue is very painful, and might even have a tendency to form contracture. Actually by that I mean where the arm will be in some position where it will be inconvenient and may even require amputation in the future.

That is the real serious situation about these brachial plexus injuries, because without nerve supply to the muscles we have a condition in which scar tissue or corrective tissue replenishes muscular tissue.

Q. What can you tell us about a—

A. If you take a knife and cut through there it would cut off the nerve supply. Now, this injury caused damage and in all probability I feel caused an evulsion, you see, of these.

Q. What do you mean by evulsion?

A. An evulsion—

Mr. Sands, Jr.: Now, if Your Honor please, I haven't rasied any objection thus far because I understood that this doctor would qualify as a psychiatrist, and I

page 144 } don't think that field has been covered. I submit that in 45 minutes, however, he has covered the ground but not the territory that Dr. Butterworth has covered excellently in five minutes this morning, and the same territory that Dr. Troland, the neurosurgeon, has covered very aptly in about 10 pages of his deposition.

I submit that this is going over this same matter for the

third time and in the fashion he is going over it I don't think it is proper testimony.

I think anything of a psychiatric nature that has to be covered should be done to the point.

The Court: Objection to the last question is sustained.

Q. Doctor, I would like for you to bring the boy in and use the boy to illustrate what you are talking about. Can you do that at this stage?

Mr. Sands, Jr.: If Your Honor please, before that is done I would like to interpose this thought, that if this doctor is going over the same testimony as was given by page 145 } Dr. Butterworth this morning as to the muscles and muscular activity itself, I am going to object to that as having been gone over, and this would be just an attempt to review and rehash that part of it. If there is any part that has not been covered, then I think it is perfectly proper, sir.

Mr. Allen: If Your Honor please, where is there any rule in law anywhere in the books on evidence or the cases on evidence that we are confined to any one or two witnesses?

Now, we know in reputation testimony the Court sometimes limits it, but you cannot say we cannot put on one expert or two experts or three, who actually examined the patient and can tell all about his injuries.

This is the last doctor we have that we are going to put on the stand, and I do not think that there is any rule that I know of by which we can be limited in testimony from a qualified person on the subject directly at issue.

If he does testify and corroborates Dr. Butterworth, what of it? Just because he testified to it, and just page 146 } because Dr. Troland has testified to it, are you to rule he cannot testify to it?

The Court: What does the witness propose to do with the plaintiff?

Mr. Allen: Well, he is going to demonstrate exactly what he is talking about.

The Court: He has already done that.

Mr. Allen: No, he hasn't had the plaintiff in here.

The Court: The objection is sustained, and the reason for that is, in the first place, this doctor has been very thorough in his oral evidence and has demonstrated himself what the boy cannot do and what he can do, and his oral

evidence has been very full about what the disabilities of the boy are with respect to the various nerve injuries and muscle atrophy that the boy suffers.

In the second place, we have already had the boy once before this jury, and I do not now propose to have him before the jury again to go over the same matter. The page 147 } objection is sustained.

Mr. Allen: We save the point, Your Honor. I suppose I should state the grounds. I just said we saved the point. I should state the grounds, I suppose. Don't know that you want them now.

The Court: You may do that after the jury retires.

Mr. Allen: All right, sir.

Note: Mr. Allen's objection and exceptions, dictated into the record in the absence of the jury, is as follows:

In the absence of the jury.

Mr. Allen: We object and except to the ruling of the Court in refusing to allow Dr. Hladys to use the plaintiff in demonstrating to the jury the truth of the testimony which he gave by the use of the medical charts. He showed the jury on the charts the brachial plexus, the group of nerves making up the brachial plexus in the lower half of the neck coming out of the openings in the spinal column from the spinal cord, and he showed them how these nerves in- page 148 } tercommunicate in the base of the neck and the region of the shoulder, and how they travel to the arm and carry instructions to impulses to muscles of the arm from the brain to control muscular activity, and that when the nerves are damaged the muscular activity is lost giving rise to a paralysis of the muscles.

Had he been permitted to use the boy to demonstrate what he was talking about, he would have shown how and wherein the paralysis he was talking about occurred, and how and wherein it affected the boy in the use of his arm and the other muscles which he testified to in using the medical charts of the muscles and of the medical chart of the brachial plexus.

The demonstration would have shown that the nerves and muscles and motions of the arm and hand were actually affected exactly as he said in his testimony from the charts that they would be affected.

Dr. Jacob J. Hladys.

The fact that Dr. Butterworth had testified to
page 149 } some extent on the same subject didn't render
the testimony of Dr. Hladys inadmissible.

Dr. Butterworth testified that he made no study of the plaintiff from a neuropsychiatric standpoint, and he was therefore not as qualified to testify on the subject as was Dr. Hladys.

Dr. Butterworth is an orthopedic surgeon. Dr. Hladys is a neuropsychiatrist. In addition to dealing with matters of an orthopedic nature he deals specifically with nerves and the psychiatric damage to the individual as a result of damage to the nerves.

We submit that it was error to deprive the plaintiff of the testimony of Dr. Hladys upon a demonstration by the use of the plaintiff himself of the truth of what Dr. Hladys had testified to from the medical charts.

The fact that the testimony of Dr. Hladys was to some extent cumulative in reference to that of Dr. Butterworth did
not render it inadmissible. We are not dealing
page 150 } with rebuttal testimony, but testimony in chief,
and we had the right to introduce any number of witnesses dealing directly with the issue involved.

It may be that I did not state as fully as I should have my grounds of objection and exception to the Court's ruling in refusing to permit Mr. Roger Jones to testify in reference to the experiment which he conducted. However, it is stipulated between counsel for both parties that if the record shows that the exception and objection is not sufficient we may be permitted to insert it at a later time while the jury is out.

Note by the Reporter: This was actually dictated in Chambers on the 2nd day of the trial, but by agreement it is here inserted in the transcript so that it will be available for easy reference.

Q. Pass on to the psychiatric feature of the
page 151 } case now.

A. Well, of course from a psychiatric and mental standpoint, in interviewing this boy on two occasions this disability has left him feeling very depressed, nervous and tense, and anxious.

He stated that his main ambition was always to be an airplane pilot, and of course that will be out of the question. He is primarily concerned because he loves to play at sports,

baseball especially, and basketball, climbing trees, and he is not able to do this.

He keeps hoping that maybe his arm will function, the functions in his arm will return and he might be able to do this.

He complained of feeling nervous at night. "I cannot sleep. I have to sit up and walk around. I stay up for about an hour. I worry about my arm. I am afraid I will never use it again."

With this there was a great deal of crying and tearfulness. Here are his words: "I used to like all sports. I played baseball, basketball, climbed trees, built huts, and swing on ropes, I can't do any of them. I can't play any sports. I can't play like I used to. I can't use my left arm, and I am afraid I'll never use it again. At school some of the boys tease me and say I'll never be able to use my arm to play baseball again. It makes me feel so bad that
page 152 } I cry."

He cried several times during the interview, especially when anything about the left arm was mentioned. He stated since the accident he has become a nail biter.

During the interview his voice was very tremulous, faint and distant. He was nervous and apprehensive, very restless. Couldn't be still, constantly moving his hands and crossing his legs. He was very sensitive about his left arm, and attempted to hide it and cover up.

I noticed as I came in here he had his hand all covered up by his coat sleeve. When he sits he will hang it by his side so it is not really seen.

He has feelings of hopelessness and feelings of inferiority, and he has a lot of insecurity about the future and about the inability to use his arm.

He frequently stated that he wished his left arm would get better so he could use it as he did prior to the accident.

Q. Let me ask you a question right here. In your studies of the case could you tell us whether or not he was developing any inferiority complex on account of this thing?

A. Yes, sir. These things that I described about the change in his voice and speech, and being apprehensive and being shy and hiding his arm and covernig it up all indicate a serious inferiority complex.

page 153 } Q. Did the particular time of life, say 12 years of age, have anything to do with it?

Dr. Jacob J. Hladys.

Mr. Sands, Jr.: Objection to the question as being leading.

The Court: But I believe it is proper.

A. Well, this boy is in a stage of puberty, which is really one of the most important periods of our lives. This is the time that we begin to become very masculine. In other words, we begin to become aggressive, and we become proud of our bodies and our physiques. And you know everybody goes in for sports and baseball, basketball and football, and that is all you can hear from boys his age, and they also begin to develop sexual drive.

Now, with this paralysis of the arm this will incapacitate him in many many cases. He is not going to feel he is on an equal with other boys his age. He certainly cannot compete with them, and actually in a way this crippled arm will have a tendency to make him want to stay by himself, and to stay away from others and really in a way coming at this period of time it is almost as serious as if, shall we say, his testicles and sexual organs were removed.

In other words, emotional damage at this period of his life is so great that I just don't feel that he will ever recover from the shock of this injury.

page 154 } Q. What is your opinion, if you have any, as to whether he will probably require psychiatric treatment in the future?

A. Well, I feel that he will require a great deal of psychiatric treatment in the future, because he will be constantly aware of his increasing lack of use and of the left arm, and then in all probability he will develop more and more of an inferiority complex, and it is almost mandatory that he receive psychiatric treatment.

Of course, we have the problem of when this boy gets older how will he feel about dating girls and being interested in girls. Will he be able to overcome this severe conflict he has about his arm? Will he date girls or not?

I have a feeling that he will not have the normal interest in girls that he should have.

Now, we did some psychologial tests on this boy, and on the 11th of March these tests revealed that he worked very slowly, he took twice as long to draw nine figures as does the average person. He was compulsive.

Q. What?

A. Compulsive, and, in other words, had to make the

figures just right. They were to be perfect. They had to be. They could not have any deformity in the figures.

In other words, he has a deformity, but he is going to see that whatever he is drawing is going to be whole, page 155 } shall we say, and he was a perfectionist.

Tests showed he was very anxious and depressed at this time. Some of the responses he made to the inkblots were that there were two bugs eating dead meat. There certainly was a very morbid type of interpretation, and suggests an underlying feeling he has been deprived and threatened by events occurring around him.

And another response, a man wiping his eyes as if he was crying. Again pointing up to the depression.

In conclusion, there was anxiety, apathy, depression, emotional constriction. You know the words, sort of keeping his feelings to himself and not developing any outward feelings, warm feelings toward others, and feelings of hopelessness.

Now, as a further sign of nervousness in addition to the movements and so forth, both of his hands were very moist, indicating that there was a great deal of tension.

Shall I read my conclusion?

Q. No, you can tell us briefly what your conclusions are from your examination from a psychiatric standpoint.

A. Well, from the psychiatric standpoint I feel that the prognosis certainly is very bad, because certainly a year after his injury he should have gotten over his nervousness, but all of the symptoms are still present.

page 156 } And I feel that as long as the arm remains useless he will continue to be nervous and depressed for the remainder of his life.

Of course, the problem that we have is that this boy will develop and is developing and has a deep-seated feeling of insecurity in what he is doing, going to do to support himself and earn a living. It is certainly a serious problem.

It will certainly undermine and tend to produce a most disturbing inferiority complex.

Q. Does the boy, from your examination, appear to be trying to do the best he can?

A. Oh, yes. The thing about Bubber is really he tries to pretend that everything is all right. I mean, that is the initial picture that he tries to give you, but in talking to him you soon find out, you begin to see that it is sort of a Pollyanna idea, all of us in combat we always felt that we were so we would never be killed, it would always be the next man.

Dr. Jacob J. Hladys.

Sort of, shall we say, that what you never worry about is actually what the real trouble is.

Q. I believe you stated a moment ago that in trying to make his arm function he used muscles that otherwise he wouldn't use. What will be the affect of using those muscles?

A. Oh yes. I am sorry I forgot to mention that point. You see, he is using muscles for these uses that page 157 } are not intended. In other words, the trese—

Mr. Sands, Jr.: If Your Honor please, if he is going back over the muscles again I am going to object to that.

The Court: Objection sustained.

Mr. Allen: We certainly want to get that in the record, Your Honor.

The Court: I believe he testified what the effect of the use of the other muscles would be.

Mr. Allen: If he didn't; I wouldn't want to go back over it if it already had been covered. On the other hand I don't want the question raised it wasn't in evidence.

The Court: Then if there is any doubt about it let him testify to it. But don't go into the history. State what the effect would be on the matter you have not covered.

Mr. Allen: I can direct the question right to the point.

A. What he is doing is he is throwing his spinal column to the left. He is also stretching the left side of his chest. As a result of that he is also tilting his pelvis. In other words, he is using his hip, and he is using his page 158 } chest, the lateral portion of the chest and spinal column so that it is twisting the spinal column, and this certainly is going to get worse and will cause an actual deformity, because he is trying to compensate for the lack of the use of the muscles in the arm.

Mr. Allen: That is all.

CROSS EXAMINATION.

By Mr. Sands, Jr.:

Q. Doctor, I take it that the sum and substance of your testimony from a psychiatric standpoint is that the boy has sustained great emotional damage as a result of this accident, is that correct, sir?

A. That is correct.

Dr. Jacob J. Hladys.

Q. I will ask you, Doctor, have you ever seen the boy before the accident?
A. No, I never did.
Q. When was the first time you saw him?
A. Well, the first time was the 5th of March, and then—
Q. 1958?
A. 1958, that is correct.
Q. When is the second time?
A. Monday of this week.
Q. Two times, in preparation for this trial?
page 159 } A. That is correct.
Q. But you had never seen him before?
A. I had never seen him before.
Q. I have only two questions to ask you, Doctor: Do you think that under those circumstances and with that observation that you, as a psychiatrist, would be better qualified to pass on the question of his emotional damage, or Dr. Butterworth who has treated him over the period of a year, has seen him under stress and strain and pain and observed his actions and his characteristics during that period of time; and if I told you that Dr. Butterworth said that aside from a feeling of protection of this arm that there is no emotional damage in his opinion resulting at all, do you think you would be better qualified from your observations than the attending physician?

Mr. Allen: I object to any answer to that question, if Your Honor please.
The Court Objection sustained.

Q. My second question is: Would you consider yourself with your opportunities of examination, or the boy's mother who has observed him all of his life before and every day since the accident, is better qualified as to whether there has been any change in his personality?
A. Well—

Mr. Allen: Objection to that question, if Your
page 160 } Honor please.
The Court: Well now, we have a very peculiar situation, Mr. Sands. The mother did not qualify as a psychiatrist, and you have used the phrase "change of personality."
Mr. Sands, Jr.: I might have the reporter read back the question asked the mother.

Dr. Jacob J. Hladys.

The Court: The phrase "change in personality," I don't know whether you are using that phrase technically or from a layman's standpoint.

Mr. Sands, Jr.: I mean in lay terminology entirely. I mean I think the mother was asked, if I recall correctly—I am sure the jury recalls—I think she was asked whether or not the boy had had any change in his makeup, or however she expressed it, and she got the idea across very well and she said that she had not observed any.

The Court: I don't want to review her testimony at this time, but I think you are trying to compare a
page 161 } psychiatrist's point of view with the lay point of view on the practical horse sense answer, and I don't know whether there is any way of asking the question.

Mr. Sands, Jr.: I didn't mean to do that. I am not trying to compare his opinion with hers. I am trying to compare his observations on which he bases his opinion. The fact that the boy was highly nervous and crying and—

The Court: You may ask him that question. You may ask him the question whether he has had the better opportunity to form his professional opinion than a layman would have to form an opinion.

Q. I will ask you that question: You are basing your opinion and giving the jury your observations based upon the two times that you saw this boy, is that correct?

A. Yes. I would like to say that in practice of psychiatry before we ever see the patient we always interview members of the family so that actually the family will be able to acquaint us with the past.

In other words, it is very obvious that—

Q. I don't want to interrupt you, but my question is: That you base your opinion upon the observations
page 162 } that you made in your interview with this young man, is that correct?

A. I base them also on the interview with his parents.

Q. Did you base them partially on the interview with the boy and the reactions that you observed from the boy?

A. I based them on the interview with the parents and two interviews with the boy, and the interview with the boy was approximately 3 1/2 hours the first time or longer, and about an hour and a half or two hours the second time, which I feel is more than adequate to be able to express a professional psychiatric opinion.

Q. I am asking you whether you think your opportunities

for observation were better than those of his mother who has observed him before and after this accident up to the present time.

The Court: To express what?

Q. To express the boy's reactions, whether his reactions of nervousness, his physical and outward reactions—

A. I think I am in a better position to understand the boy.

* * * * *

page 164 }

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Mr. Allen: May it please Your Honor, it was agreed on yesterday I believe that I might introduce the mortality tables showing the expectancy of the plaintiff, and I have here mortality tables put out by the United States Department of Health, Education and Welfare, Public Health Service, National Office of Vital Statistics.

Mr. Sands, Jr.: We have no objection. As a matter of fact, he can state and we can stipulate the language from that chart.

Mr. Allen: Showing the expectancy of a white boy between 12 and 13 years of age is 56.42. That is 56 years and 42/100ths of a year. We might just as well say 56 years.

Mr. Sands, Jr.: That is right.

page 165 } Mr. Allen: And between 13 and 14 years it is 55.46.

The Court: It is so admitted.

Mr. Allen: I now wish to call Mr. Ralph Snyder.

RALPH H. SNYDER,

a witness introduced in behalf of the plaintiff, first being duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Allen:

Q. Mr. Snyder, will you tell us your name, please?

A. Ralph H. Snyder.

Q. Where do you live?

A. Oklahoma City.

Ralph H. Snyder.

Q. What is your profession?

A. I am a safety engineer and an accident analyst.

Q. How long have you been engaged in this type of work?

A. I have been in basic safety engineering for the past 26 years, and I have been doing accident analysis work mostly during that time.

However, I would say that the import of it has
page 166 } been the last 10 or 15 years, about 15 years of it
have been analytical work alone.

Q. Would you give us a little history of your work in that field say for the past 10 or 15 years?

A. Well, I started out in this field, safety engineering with Bores and Race in Wichita, and with the Sturman and Travelair Aircraft Corporation. Sturman is now Boeing, and the other is Beechcraft.

I worked there for 5 1/2 years, then I spent three years as a photographer on the Wichita Beacon, a newspaper.

Then I came to Oklahoma City and I spent 9 1/2 years as Assistant Safety Consultant for the Federal Works Administration.

About that time war started up, then I took the position as Safety Director for the Tinker *Airforce* Base, which is one of the large bases in the country. They had 20,000 workers during the war.

After the war then I was safety director for the City Bus Company there for approximately 3 1/2 years. For the past 11 years I have been in business for myself.

Q. Have you a business known as the Driver Testing and Training Service?

A. Well, yes. I actually have three businesses, if I may
name them. My main business and source of
page 167 } income is what is known as Driver Testing and
Training Service.

In that business I have a laboratory established for the testing and training of professional drivers, truck drivers. In which we service practically all the fleets in the Oklahoma area who send their drivers into my laboratory to find out whether or not those drivers are trained and capable and stable to drive trucks, whether or not they are accident prone. That is one business.

Now, two or three years ago I perfected and marketed a device known as Accident Analysis Calculator. This is a device used by attorneys and police officers, or anyone who has to do with accidents and skid mark distances and so forth, visibility distances. It is a device that we are selling nation-

ally. And in order to put this out under another name we established the name of Safety Service Company.

I have a third business which is known as an Accident Analysis Laboratory.

Due to my years, many years of experience in that accident field, attorneys and police departments send me difficult accident cases. Perhaps it is better compared like criminologists who analyze crimes. My business is to analyze accident cases from the physical evidence.

Q. What does that physical evidence consist of, your seeing the scene or seeing photographs or what?

page 168 } A. Well, it is very apparent that I of course would be out of contact at the scene when the vehicles are there, although in my past experience I have investigated thousands of accidents at the scene. In this business of my accident analysis laboratory, the attorneys send me photographs and diagrams and usually the police report of the accidents, and from those physical facts of the accident is what I reconstruct the accident from.

Q. Are you a member of any professional organization or society on these subjects?

A. Yes, sir. I am a member of the American Society of Safety Engineers. I belong to the National Safety Council, and all the local safety organizations.

I am an honorary member of the Oklahoma Highway patrol. I also belong to the National Highway Research Board, and I am an associate member of that.

Q. Have you written any articles on these subjects?

A. Yes. I have written numerous articles on traffic safety and driving. I have written two books, one is known as the No How of Professional Driving, which we marketed nationally.

Another is known as Here You Drive. I am in the process now of writing a third text on Accident Analysis Through Physical Evidence.

page 169 } Q. Have you in the past been called upon to speak at conventions, meetings, bar associations and so forth on the subject of accident analysis?

A. Yes, I speak over the country several times a year at various bar conventions and meetings and such as that. Safety organizations and meetings.

Q. Have you had occasion in the past on many or a few occasions to investigate traffic accidents?

Mr. Sands, Jr.: I object to that as being leading. Every

question he has asked this witness I think is leading. He has been telling him the history rather than the witness telling us the history.

The Court: See if you can, Mr. Allen, state your questions in a less leading form.

Mr. Allen: I will try to avoid that. I am just trying to get along.

Q. What has been your experience in the investigation of accidents at the scene, or from photographs of vehicles involved?

A. Well, as I previously stated all during my experience in safety work it has been my job, and I have investigated, thousands of accidents at the scene, and of course in my accident analysis laboratory I have had literally hundreds of cases come across my desk for analysis in which

page 170 } I have not seen the vehicles or the scene.

Q. What experience have you had if any in making personal tests on braking and stopping distances of automobiles and trucks and so forth?

A. Well, I have had considerable, because in the past years we have worked very closely with the highway patrol and the city police and other safety organizations in taking various types of vehicles and testing brakes in connection with establishing braking distance charts, and finding out the difference in the types of surfaces of the road and the different weights of vehicles.

Also types of vehicles and even the rubber used on tires. We have done extensive tests on that.

Q. What experience have you had if any in determining from photographs of the vehicles involved the angle at which they came together?

A. Well, the angle of impact and such as that is a part of accident analysis work.

Q. Are you ever called upon to testify in Court on these subjects?

A. Yes. That is one of my big—I have testified I guess in 15 states and practically in all types of courts, hundreds of courts all over the country.

Q. Suppose you have a standard fee for that

page 171 } service?

A. Yes, sir. I have a standard per diem fee. I get paid so much a day.

Q. Would you mind telling us what it is?

A. No. I get $100.00 a day plus expenses.

Ralph H. Snyder.

Q. Mr. Snyder, what is meant by the angle of impact, which I referred to a moment ago.

A. The angle of impact between two vehicles is the angle in which one vehicle will strike another.

Q. Will you please explain to the Court and the jury how you determined that, the angle of impact, when one vehicle strikes another?

A. Yes. In all instances where one vehicle strikes another we have the bending of metals. Now, in many instances there are soft metals and some instances there are hard metals. The angle in which those metals are bent indicate the direction of the force.

These are all based of course on the established laws of physics, and an analytical work in this type of thing would consist of—we determine first of course as to where the first contact was, the first touch, where the first impact takes place, and the first metals that are bent. Then from that factor we can then accurately determine as to the positions of the two vehicles at the time of the first impact, or when the blow was made, by the angle and the direction in which the metals are bent.

page 172 } Q. Mr. Snyder, I now hand you Plaintiff Exhibit No. 4, Plaintiff Exhibit No. 2, and Plaintiff Exhibit No. 3 and will ask you if you have had occasion to examine these exhibits and if so when?

A. Yes, sir. I have examined them, these photographs.

Q. When did you examine them?

A. These were sent to me in the early part of March of this year.

Q. Did you examine them there in your laboratory or after you came here?

A. No, I examined them in my laboratory.

Q. Did you make a study of the analysis to determine the angle at which the automobile struck the bicycle in this case?

A. I did.

Q. Can you tell us what that angle was?

A. Yes, sir.

Mr. Sands, Jr.: One moment. If you are going to answer that question I wish to note an objection. I have heard of these crystal ball gentlemen for a long time, but this has been my first experience, I must say, in contacting one. But I take it that he is going to attempt now to tell or to testify

page 173 } as to the actual manner in which these vehicles came together.

Ralph H. Snyder.

I submit to the Court that that is exactly the purpose for which this jury has been impaneled, and for which this Court is sitting. It is for the jury to determine as to how the impact took place. That is a part of their deliberations.

Certainly under our system that is the way that these facts are arrived at and not at having the photographs and other evidence poured into some channel a thousand miles away and to come up with that type of an answer.

This witness can describe the damage that he knows about. I have no objection to that. But as far as stating the manner in which the impact took place, I submit that that is improper.

Mr. Allen: He is not going to testify as to the manner. All he is going to testify is from his analysis the angle at which they came together.

The Court: He may only be allowed to testify from his study of the pictures and other matters and things
page 174 } he studied, his professional opinion as to the angle at which the two vehicles came together. He cannot state categorically that the car and bicycle came together at a certain angle as if that were the whole dogmatic truth of the matter.

He may as an expert state his opinion on it from the result of the studies that he made.

Mr. Allen: That is all we want him to do.

The Court: That was not the question put to the witness.

Mr. Allen: I intended to do that. I will change it, then.

Q. From your studies of these photographs in your laboratory, have you an opinion as to the angle that these vehicles, that is the Ford car, came in contact with the bicycle?

A. I have an opinion, yes.

The Court: The next question that you put to the witness, I will ask the witness to not answer it until Mr. Sands has had an opportunity to state his objection, if any.

Q. Will you give that opinion and your reasons? Will you give that opinion? Wait a minute, don't answer
page 175 } the question yet.

Mr. Sands, Jr.: I object to that opinion for the reasons as I have stated. I think the witness may be allowed to describe the physical facts as he has seen them from the

pictures. I think he can describe the way that they are dented. I do not think that he can determine or draw a conclusion from that as to the manner, because that is within the scope of the jury's determination.

The Court: I have ruled before that he in his capacity as an expert may state his opinion with regard to that.

Mr. Sands, Jr.: I except for the reasons stated.

The Court: Answer the question.

A. In my opinion—may I answer, Your Honor?

The Court: Yes.

Q. Refer to the back of each picture as to the number of the exhibit.

A. Yes, Your Honor. Referring to Plaintiff Exhibit No. 3 of this photograph here, if you will notice, that the—

Mr. Allen: May it please Your Honor, might page 176 } he get a little closer to the jury?

The Court: I think he can describe it from where he is. Can you gentlemen of the jury see the picture all right?

Note: The jury answered in the affirmative.

A. "The tire and rim and spokes are bent in two directions, inward and toward the bicycle's left side. The angle of impact is not directly straight in, but it is angled out also to the left."

Now then, on Plaintiff Exhibit No. 4 the amount of bend which is the right side view of the bicycle and wheel, the right side view shows perhaps more clearly the amount of indentation into the wheel, and the bending of the spokes.

Plaintiff Exhibit No. 2 the amount of, or angle of the wheel being bent outward toward the left is clearly shown. The photograph was taken from a direct straight behind view. By placing my pencil approximately where the straight point is, this straight side here, that would show the amount of curve to the bicycle wheel toward the bicycle's left-hand side. Thus the angle of impact between the two vehicles would be that if we would suppose that this little roll of tape here is the bicycle wheel, and this of course is a car (indicating), that the bicycle would be struck at approximately this angle. That

Tire, rim and spokes

page 177 } the car is inclined toward the bicycle's left side. That the angle or blow came from the back to the bicycle's left side, such as I am demonstrating here.

By the Court:

Q. You say it came to the bicycle's left side. Do you mean that, that the automobile came to the bicycle's left side?

A. Well, Your Honor, perhaps I didn't make myself clear on that. Supposing that this is the rear wheel of the bicycle, and the front wheel is up here (indicating to the Court). And the same view that we had on Plaintiff's Exhibit No. 2, 3 and No. 4, and referring especially to Plaintiff's Exhibit No. 4 of this picture here of the bicycle, and assuming that this is the wheel here in this position (demonstrating with photograph and small roll), the automobile in question would have to have been going in the direction of the bicycle's left side, or would have struck it from the bicycle's right side. The angle of impact would have gone through in this line such as I am demonstrating here.

By Mr. Allen: (Continued)

Q. Did you find any scratches or indentations or anything on the left side of the bicycle?

A. No, sir.

Q. Indicating that anything approached it at all while the bicycle was turning left?

Mr. Sands, Jr.: Objection.

page 178 } The Court: Mr. Allen, the bicycle I believe was 14 months old.

Mr. Allen: Pictures were taken immediately after. That is all right, I will strike that question. I will ask it differently.

Q. Did you examine the left side of the bicycle as shown by the pictures?

A. I did.

Q. What were your findings in that respect?

A. My findings in examining the photographs on the left side of the bicycle indicate that there is no sign of impact anywhere on the frame, pedals, rear fenders, front wheel or fenders of the bicycle, that they are free from any deep scratches or any bends or such as that that would indicate impact.

Ralph H. Snyder.

Q. Now, Mr. Snyder, are there established night visibility distance charts which show the distance a driver of an automobile can see at night various objects such as pedestrians, including persons on bicycles in the dark, with medium dark clothes or light clothing?

A. Yes, sir, there are. When I made up my accident analysis calculator, and in order to establish correct visibility headlamps given distance at night, we made not only tests in connection with the city police department—

page 179 } Mr. Sands, Jr.: If Your Honor please, I object to the tests made with the Oklahoma City Police Department. Our State of Virginia provides the distance that headlamps must show, or be able to pick up an object both on high beam and on low beam, and I submit that that is a statutory duty in this state and it speaks for itself.

The Court: Well, it is under certain conditions. The only question in this case is whether this witness is going to be able to testify with regard to the type of conditions that existed in this case.

Mr. Allen: That is the object.

Mr. Sands, Jr.: Then probably the objection was premature.

A. In order to be more accurate, I received the established results of tests made by General Electric Company, the manufacturers of the headlamps. Manufacturers of sealbeam headlamps for that Ford car, and they are also in close coordination with the tests that I have personally made.

The figures and distances I used on my calculator are those established by the General Electric Company in Nela Park.

Q. The evidence in this case shows that on the page 180 } night of the accident that the weather was rainy, with a heavy mist somewhat limiting visibility. Based on your average visibility distance for clear and dark night, and tests made by you, do you have an opinion regarding the minimum visibility distances which one would expect to see at night, on a night such as I have described to you?

Mr. Sands, Jr.: Now, if Your Honor please, I object to that question. Assuming he could give the result of the test as to a dark night with clear visibility, I do not think that the witness would be qualified to give a test in feet

without having specifically before him the visibility on this particular night.

I think that that is a matter for the other witnesses to testify on, and they have testified on that.

I do not think that this witness could say, for he would not know how heavy or how dense a fog existed on this night. The jury is to determine that from all the evidence. I do not know how heavy a heavy mist is. In some mist you could probably see 50 feet, some others probably only 25, and the witnesses themselves who were there that night page 181 } have to testify to how far they could see under those conditions, not this witness sitting in Oklahoma City and who was told later on it was a foggy night, sir.

Mr. Allen: We have no reference to this particular occasion. We are asking him for the average minimum distances under certain conditions stated in the question.

The Court: I want to ask him this.

By the Court:

Q. Have you conducted tests to establish distances that one can see under certain adverse weather conditions?

A. We have, Your Honor. I have, Your Honor, yes, sir.

Q. With regard to raining, fog and mist, light fog, as between those particular types of adverse conditions is there much variation between the visibility in which one could see a bicycle with a reflector on the back of it, and burning a light?

A. Your Honor, there is this, it is all of course based on averages. The density for example of fogs will of course vary, and a person could not determine, unless one would know the visibility factor and how dense the fog was. In the average rain and mist in which we encounter in most areas— I am not talking about cloudbursts or deluges, but page 182 } the average rain or mist, we have made tests under those conditions, and where there might be perhaps a slight ground fog in addition to that, those things are variables, and my testimony is such that all I can do is to give an estimate as to the approximate distance visibility would vary under conditions that I have just described of the average rain and mist and the night, with people with dark clothing, pedestrians.

That is the most adverse type of clothing to be seen on a

highway, and that is where most of the tests are made. So we have the absolute minimum—

Mr. Sands, Jr.: If Your Honor please, if you will permit me to interpose my objection, then I will not delay this any more. But my objection is specifically this: That the Court knows and every member of this jury knows that fogs and mists differ just as night and day. Your Honor has seen a fog in which you could see very little, you would hesitate to drive more than 10 miles an hour. You have seen a very light fog. You have seen a heavy ground fog, and you have seen one that left a space off of the ground. We have seen mist conditions that vary greatly, and my objection is based upon this fact: That I think that the visibility con-
page 183 } trolling this case must be predicated upon the weather conditions on this particular night, and the visibility on this particular night as testified to by witnesses who were present at the time and saw the type of fog, or the type of mist; that this gentleman couldn't possibly take an average of all of the country of a misty or foggy night and give testimony as to how far one may see under those average conditions that would have any probative value whatsoever in this case.

That is my objection, sir, and I shall not interrupt any longer other than to make appropriate exception if it becomes necessary.

The Court: We will take a recess at this time, and during the recess I will ask the Court Reporter to check the defendant's testimony as to what the weather conditions were on the night in question, when he was examined as an adverse witness by the plaintiff. We will take a five-minute recess.

Mr. Sands, Jr.: Before that is done, I think if the Court wants that that we have it right here. I believe that has been typed up already.

page 184 } Note: Transcript of the evidence requested is now handed to the Court for inspection.

The Court: I have read this transcript, and I will now ask the witness this question:

By the Court:

Q. Have you made any tests prior to knowing anything about this case, prepared any tables or charts made from tests that would indicate visibility under conditions where a

person would say to you that the night was misty and foggy and visibility was cut approximately 50 per cent?

A. I have, Your Honor. In addition counsel advised me that—

Q. No, not that.

A. I have.

The Court: Well now, gentlemen of the jury, I want to listen to the answer of the witness in your absence. I will ask the jury to step out at this time.

Note: Jury now retires from the Courtroom, and the witness is examined as follows:

Jury out.

page 185 } Mr. Allen: From what were you reading?

The Court: From the defendant's testimony on page 3, line 6. Also page 9, line 1. In the absence of the jury, so that we can just see what this general line of answer is, just go ahead and testify what your testimony was going to be in answer to this line of questioning.

A. My answer would have been that the established visibility distance on a clear dark night with the lower beam of the vehicle on of the new type headlight, same model as the 1956 Ford, that the visibility, average visibility distance of an individual in dark clothing is a minimum distance of 210 feet.

That in accordance with the testimony that has been presented, and the tests that I have made on an approximate 50 per cent visibility cut down or diminished visibility at 50 per cent, my testimony would be that I would have to cut this distance of 210 feet to where the visibility would be approximately 105 feet.

That was also taking into consideration that the defendant testified that he was traveling at a speed of 45 miles per hour, which indicates that for him to have been traveling at that speed the visibility for him would have been

page 186 } such that would have enabled a man to have traveled that speed—that has to be taken into consideration, that one—

Q. What does the speed have to do with visibility?

A. Because we have found, Your Honor, that at higher speeds a person traveling—in other words at 60 miles per

hour a car is going 90 feet a second, and that has a bearing in visibility distance, that for each ten miles an hour speed over 50 miles an hour we should subtract 20 feet from the visibility distance, and for each—and we add each 20 feet for each 10 miles an hour under 50 miles an hour.

Q. Why does the speed at which one is moving through the atmosphere have anything to do with how far ahead one may see at any particular place that he is.

A. It has to do with the perception. In other words, it takes time for a person to see and absorb. And at each instant at which we are observing our visibility perception changes, and it takes time for us—for example, when in reaction time where we have an emergency appear before us, we have a situation of not only being able to see what the emergency is but to recognize what it is, and that is what is known as perception, and the faster one is going the quicker the vehicle is closing in upon the known hazard and the time of change.

That is the same way with the ribbon of road
page 187 } going ahead of us when we are driving down the highway at night.

Q. I am not talking about time in which a person can stop.

A. No, sir, I am talking about perception, ability to see. Tests have shown that the faster we are going that our visibility distance is cut down.

Q. Well now, what would your answer be with regard to how far the person could see an object ahead of him under these conditions traveling 45 miles an hour?

A. My answer would be, Your Honor, that the perception distance would have been cut down 50 per cent, therefore by cutting down the known perception distance—I mean the known visibility distance on a clear dark night of 210 feet, that we would approximate this visibility distance as being 105 feet.

The Court: While the jury is out, let me ask counsel this: What other technical questions are going to be asked of this witness?

Mr. Allen: I want to ask him one more on another subject while the jury is out.

The Court: I just wanted to know, while the
page 188 } jury was out, what we were headed for. I think that this witness may be permitted to answer the question that he has just answered. In other words, it

seems to me that if his tests have qualified him, and from his experience, he can show what the visibility distance at 45 miles an hour would be on a clear night, that he can testify what half of that would be under the evidence that has already been introduced by the defendant.

I will permit him to answer that question.

Mr. Sands, Jr.: If Your Honor please, I would like to object to that on the ground that I think if visibility is 200 feet on a clear night and that visibility is cut to 50 per cent that even a child, and I imagine the jury as well, could estimate that that would be one-half of that figure, and I do not think that that is a matter for expert opinion.

The Court: Well, that would just be surplusage then as to the first part of it. I will let him testify as to what the visibility is under normal clear conditions, and if half of it is half of it, he can state that half.

Mr. Sands, Jr.: Exception, Your Honor, for
pge 189 } the reasons stated.

Mr. Allen: That is all I want to ask him on this subject. Your Honor put the questions to him there, and I might vary them some. Would it be proper to let the reporter read the questions asked and the answers given to the jury?

The Court: No, I think they had better be restated.

Mr. Allen: All right, sir, I would prefer that.

The Court: If you prefer me to do so, I will ask him the question.

Mr. Allen: Yes, sir, it would be better.

The Court: It would be either one or two questions.

Mr. Sands, Jr.: If Your Honor please, I do not want to quibble about this, but I think you should have either the reporter read the questions back, or Mr. Allen to ask it. I think the questions coming from the Court might have an inference not intended.

The Court: All right, then. I will dictate a
page 190 } question and then Mr. Allen can ask it in the presence of the jury.

Mr. Allen: All right, sir.

The Court: Mr. Allen, you may ask a question along this line first: State the visibility that a person driving 45 miles an hour on a clear night would have.

Mr. Allen: Yes.

The Court: Then after he has answered that question, which I understand from his previous testimony will be something about 210 feet, then you may ask him the question:

What would the visibility be under similar conditions if it was cut approximately 50 per cent.

Mr. Maurice: Don't you think you ought to bring in about the dark clothing? There is a difference between dark clothes and light clothes.

The Court: He may state in his answer what the object he is talking about would be, yes. I think those two questions will be all right.

page 191 } Mr. Allen: Judge, I am going on into another subject, I don't think there will be any objection to it. But I might as well state now what it is and see.

By Mr. Allen:

Q. Mr. Snyder, the defendant has testified that at the time of the accident he was going at a speed of approximately 45 miles an hour, and that after striking the bicycle he was able to bring his vehicle to a stop within a distance of between 25 to 30 feet.

In accordance with the established and accepted braking distances and charts and tests which you have made, do you have an opinion as to whether or not it would have been possible for the defendant to have stopped his vehicle under the circumstances of this case, wet road, in the distance he claims traveling at approximately 45 miles an hour?

A. My testimony would be that I can, and on dry surface the braking distance would be 100 feet at 45 miles per hour. Therefore, he would not have been able to stop even on a wet surface which would have increased that distance approximately 25 per cent.

Mr. Sands, Jr.: We have no objection to that.

The Court: Very well, bring in the jury.

Note: The jury now returns to the Courtroom.

Jury in.

By Mr. Allen:

Q. Mr. Snyder, in your experiences have you made any tests, visibility tests on a road similar to the one we have here on a dark, clear night, with a car like the one described here traveling at the rate of 45 miles per hour?

A. I have.

Q. What did they show?

Ralph H. Snyder.

A. On a clear, dark night the average visibility distance for a person in dark clothes is 210 feet.

Now, that is the lower beam of the headlamp, and the later model of headlamps after 1955, and my understanding is this was a 1956 Ford. So it would be 210 feet.

Q. Now, take the case where the night is dark, rainy, misty and visibility cut say approximately 50 per cent.

How far would the man be able to see traveling at that same rate of speed?

A. Well, that would be just 50 per cent or half of this distance.

Q. Which would be what?

page 193 } A. 105 feet, approximately.

Q. What do your tests show with reference to whether the rate of speed at which a man is traveling has anything to do with the distance he can see?

A. Well, it has.

The Court: I do not believe that I allowed that.

Mr. Allen: All right, sir. I won't ask that question.

Q. Now I will ask you: I believe you testified, Mr. Snyder, with reference to your experience in connection with speeds and stopping distances and the like.

A. I have made tests on that, yes, sir.

Q. You haven't testified to that here, today, have you?

A. Only in my qualification I stated that we have made extensive tests in braking distances.

Q. That applies, as I understand it, to visibility, too?

A. Yes, sir.

Q. The defendant has testified in this case that at the time of the accident he was going at a speed of approximately 45 miles per hour, and that after striking the bicycle he was able to bring his vehicle to a stop within the distance of between 25 to 30 feet.

page 194 } In accordance with the established and accepted braking distances charts, and your experiences and tests, do you have an opinion as to whether or not it would have been possible for the defendant to have stopped his vehicle in the distance he claims, traveling at approximately 45 miles an hour?

A. Yes, sir, I have an opinion.

Q. What is that opinion?

A. The established braking distances on dry pavement

such as I saw out there at the scene at 45 miles an hour is 100 feet.

Now, I mean by that after the brakes are applied. Now, that surface when wet would approximate 25 per cent longer braking distance.

Therefore, the minimum braking distance at 45 miles an hour with the surface of the highway wet and at night would be approximately 125 feet after the brakes are applied. That doesn't add in the reaction time factor.

Q. If you add the reaction time, what would the amount be?

A. The reaction time at 45 miles an hour, or three-fourths of a second, is 49 feet. So it would approximate 174 feet of braking distance, including the reaction time.

page 195 } CROSS EXAMINATION.

By Mr. Sands, Jr.:

Q. How many feet per second does a vehicle go at 45 miles an hour?

A. At 45 miles an hour the vehicle is going 66 feet a second.

Q. I believe you stated that you spend quite a bit of your time in court testfiying?

A. Yes, sir.

Q. On matters of this sort. How many times have you appeared in the last year, would you say, in court?

A. You mean since January?

Q. Yes.

A. Oh, I would average I imagine since January, since the big rush is on, about once a week.

Q. And your per diem is $100.00 per day. What are your expenses up here, sir?

A. My airplane fare I think was around $285.00 or $200.00 somewhere in there. I am not certain of that. My hotel bill and meals may run, oh, altogether about $25.00.

Q. I have one other question to ask you.

Mr. Sands, Jr.: I wonder if Your Honor would permit me to approach the table to draw a little sketch? May I do that, sir?

The Court: Yes.

page 196 } Q. Let me clarify my own thinking, to be sure I understand your testimony. Did I understand

you to say that from your best expert opinion that the impact came from right to left on the bicycle, striking the bicycle on the right-hand side and forcing it to the left?

A. That is right, yes, sir.

Q. The evidence in this case is that this accident happened on Highway No. 60 running approximately east and west; the evidence is that both the vehicle and the bicycle in this case were heading in generally an easterly direction toward Richmond at the time; the evidence in this case undisputedly up until the present time is that the bicycle marks which were perfectly visible and apparent on the shoulder approximately a foot off of the hard surface went in an absolute straight direction up to the time that they ended, and up to the time of the impact.

I am going to draw on here a little box under those circumstances which would represent the bicycle, based on the testimony that I have narrated to you, and I will ask you to take the pencil and draw a picture of the little box of the automobile that would be in relation to that bicycle based on your conclusion as to the direction of impact.

A. I can draw the automobile at the angle of impact. As to placing them on the highway, I would not be able to do that.

page 197 } Q. I am not asking you to do any placing. I have placed the bicycle in accordance with the hypothetical question which I have asked based on the testimony today.

I am asking you now if that is the position of the bicycle as you see it there, what would have been the position of the automobile?

A. All right.

Note: Witness at this point drawing square to indicate the position of the automobile on the diagram.

A. (Continuing) I am placing it there to show the angle. Therefore, the position of the automobile would be the square of that angle.

Q. Would you draw a little box on that?

A. Yes, I did (indicating). That is roughly.

Q. Will you put an "A" in the automobile box?

A. Yes, sir. (So doing)

Q. And a "B" for the bicycle?

A. Yes. (So doing)

Ralph H. Snyder.

Mr. Sands, Jr.: I have no further questions. I would like to file that as Defendant Exhibit A.

Note: This diagram above used in illustration is now marked and filed as Defendant Exhibit A.

Witness stood aside.

page 198 } Mr. Allen: That is our case, Your Honor.

Note: At this point Court and counsel retire to Chambers, as follows:

In Chambers.

Mr. Sands, Jr.: Your Honor, at the conclusion of the testimony of the plaintiff counsel for the defendants move the Court to strike the evidence of the plaintiff on the grounds that the plaintiff under his own evidence is guilty of contributory negligence as a matter of law barring recovery.

In making this motion I fully realize the usual rule that would be applicable to this that he is 12 years old and therefore a presumption would arise ordinarily as to freedom of negligence on his part. However, in this case not only has it been shown that the boy is an average or better student, but specifically as to this specific act he himself has testified that he knew at the time that it was dangerous for him to ride his bicycle on the highway, the hard-surfaced portion of the highway, and that he was not so doing; and his mother has specifically testified that she warned him
page 199 } specifically against riding on the hard surface, both on this occasion and on other occasions. Under those circumstances the danger would have been fully known to him.

Ordinarily whether he was on the hard surface or not, I further realize, would be a jury issue, but in this case the physical facts are such that it would be impossible for the jury to draw the conclusion that the boy was other than on the hard surface at the time that the accident took place.

The Court: The motion is overruled, the Court being of opinion that both questions, namely that of his capacity for negligence, and the fact of alleged contributory negligence, is a jury question.

Mr. Sands, Jr.: Exception, Your Honor, for the reasons stated.

Dr. Virgil Robert May, Jr.

Note: Court and counsel now retire to the Courtroom, and are now before the jury.

Jury in.

page 200 } DR. VIRGIL ROBERT MAY, JR.,
a witness introduced in behalf of the defendants, first being duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Sands, Jr.:

Q. Dr. May, will you state your full name, age and specialty, sir?

A. My name is Virgil Robert May, Jr. I am a practicing physician in the City of Richmond. My specialty is orthopaedic surgery.

Q. I believe that is the same field Dr. Butterworth is in?

A. Yes.

Q. With whom are you associated in the practice?

A. I am associated with Dr. William Deyerle.

Q. Do you know whether Dr. Deyerle has examined this boy?

A. Yes. Dr. Deyerle has examined Clinton Jones.

Q. Can you tell the jury whether Dr. Deyerle will be here today, and if not why not?

A. He will not be here today. He had to go to an orthopaedic meeting on the West Coast.

Q. He has gone to that meeting and is attending
page 201 } it now?

A. That is right.

Q. Will you state, sir, your training in this particular branch or specialty, and your background?

A. I am a graduate of Hampton-Sydney College, Medical College of Virginia, 1943. Following that I took my internship in Pennsylvania, following which I took training, began my specialization training in orthopaedic surgery. Continued on at Pennsylvania two years more, then I went into the service. Was in Manila two years at the Tenth General Hospital, and later at the Fourth General Hospital as an orthopaedic surgeon.

Following my return from the service I went to Northwestern University at Chicago for two additional years in orthopaedic work. Since that time, since 1950, I have been

Dr. Virgil Robert May, Jr.

practicing in Richmond. I am a member of the Medical College of Virginia Faculty as associate in orthopaedic surgery.

I am on numerous staffs of the various hospitals in Richmond, namely the McGuire Veterans Hospital, Grace Hospital, St. Elizabeth's Hospital and the new Richmond Memorial Hospital.

The Court: The doctor is qualified to practice.

Q. Will you state, please sir, whether or not at my request you have examined Clinton Jones and if so on page 202 } what date did you perform your examination?

A. I examined Clinton Jones on the 18th of March. He came to my office with his mother, and at that time I examined him.

I understand from the history which I obtained from his mother that he was injured in an automobile accident when he was riding his bicycle on or about the 5th of February, 1957, and at that time he was admitted to the Johnston-Willis Hospital and was under the care of Dr. Troland and also Dr. R. D. Butterworth.

He had at the time x-rays taken of his shoulder, and these were negative for any fractures or dislocations, but he did have a paralyzed left arm, extending from his shoulder down to his hand.

At first his condition I understand was worse, and it has improved over the past year, with the passage of time, frankly, and the treatment that he has received.

At the time that I saw him he had a partially paralyzed arm. In other words, it wasn't total by any means. There were certain muscle groups that were useless, but there were more muscle groups in my opinion that were of some benefit.

He came into my office wearing a brace. The left arm was thinner than the right arm. In other words, from not using it or not being able to use it the muscles had page 203 } begun to atrophy. He could raise his muscles up like this by holding his shoulder up in this type of manner. He could not raise his left arm from his shoulder. In other words, he could not abduct it, raise it to the side.

He could flex the elbow. This was weak, however. Could flex the elbow. Gravity would extend the elbow. He could not hold his wrist in flexion. He could not straighten his fingers out, including the thumb. He could not straighten any of them or extend the fingers. He could flex the fingers,

he could flex the fingers when his wrist was down. He could flex the fingers, and the muscles in his forearm. The flexion of the fingers and wrist I felt were good.

Q. Dr. May, at this point and looking at him as of today, I take it from the nerve injuries you have described he cannot raise the arm out this way (indicating)?

A. That is right.

Q. He cannot raise his wrist or make any movement up or back although he can grip?

A. Yes, and he can flex his wrist.

Q. As of today what would you estimate his percentage of disability to be in his present condition, assuming nothing were done and he didn't get any better?

A. Well, I feel this way, I feel that the boy had a brachial plexus injury, and he has shown improvement. It is true it has been a little over a year, but I feel he is page 204 } going to improve even more. When I saw him it was my opinion he had 70 per cent, approximately 70 per cent. I cannot get it accurate judging on an active boy, but 70 per cent loss of use of the left arm.

Q. Dr. May, I wonder if you will tell us, sir, and let's take these phases of it up one at a time:

With reference to his ability to raise this arm, and to get the arm around and maneuver it in this way, what if any rehabilitation surgical procedures would you feel would benefit the boy in that respect, before going any further?

A. I think undoubtedly this boy is too soon at the present time, sir, to perform surgical procedures. It is too early in order to, say, transplant muscles or tendons, or to do function operations, to put his joints at a better position.

I feel that it is too soon for that after his injury. I feel it ought to be approximately two years, we will say, 18 months to two years, before that is done, because we don't know how much he is going to improve.

Q. Would you demonstrate to the jury first as to the shoulder, or what operation you would recommend if any in the shoulder area?

A. If he stays as he is—but he has shown improvement, according to my understanding. The operations page 205 } are several, and I believe undoubtedly that he will be rehabilitated by surgical procedures. In other words, I do not feel that the boy himself at his young age, or his parents, will allow him to continue as he is now, provided he doesn't improve.

In other words, he will have surgical procedures performed, because I feel they will be of a definite benefit.

The first procedure I would consider would be a shoulder fusion. Now, a shoulder fusion is done not uncommonly. Done primarily in polio cases who have had paralysis of their shoulder muscles, or their upper arm muscles, so that they cannot abduct their arm to the side.

Now, say he can do this (indicating), well, we fuse the shoulder and by that I mean the humerus bone or the long bone in the upper arm to the wing bone or the scapula, because he can do this, and we fuse this bone to the scapula bone, and we fuse it in such a position to the side to a certain extent, because the muscle will give. The good muscle will give. They will stretch, mind you. But when he goes to raise his arm to say this extent (indicating), now I do not say he will be able to put his hand over his head, no, but it will give him a better useable arm, in other words, to abduct his arm.

Q. Doctor, did he have any form of brace on at the time he came to you?

page 206 } A. Yes.

Q. What would the effect of the operation you have just described have upon the necessity for that brace?

A. Well, I feel this way, that probably other surgical procedures would have to be done to really eliminate this brace. But this brace can be eliminated, I believe, I believe that it certainly can be eliminated.

Q. So that the operations that you have just indicated to the shoulder, or that one if it was performed, would give a useable motion as you say, and have indicated?

A. That would still leave the hand. It would still leave the hand in flexion, and it would still leave him with the inability to dorsiflect or extend his fingers.

Q. What would be your recommendation in that connection?

A. My recommendations would be he have procedures—mind you, this is done in stages. You don't operate on the shoulder and on the hand all the same time. It is done in stages. And as you progress along you evaluate him to see what the next procedure is going to be.

I feel that the next procedure probably would be to work on the transplantation of tendons in the wrist, or in his fingers, because he can flex. In other words, he can flex his fingers.

Dr. Virgil Robert May, Jr.

We have several tendons in the hand. I won't
page 207 } go into them in detail, but No. 1 would be—I
shall not go into real detail, because I do not think it is important. But take the good flexing tendons of the hand and bring them around and attach them into the extensors of the fingers. That will allow the fingers to extend. But when it allows the fingers to extend and also to raise up the wrist, that would be right much for a muscle to do. In other words, it would be too much to do. So we also would have a fusion of the wrist to consider, by putting the wrist at what we call a neutral position. He is like this now, he is like that now (indicating). But if we put the wrist up at a neutral position it would give him a better hand in which to use.

If we transplanted his tendons we would attempt to extend the thumb, extend the fingers in this manner. The tendons which he has in these fingers here are, I would say good at the present time. Flexion tendons are good. So we would do the procedure for him to extend the fingers. We would do another procedure for him to fuse his wrist in a neutral position.

Q. Go ahead, sir.

A. And they will be done in stages. There is another procedure—actually he has motion. He has biceps motion, or this (indicating), but that is weak. I would consider that as a last thing, in other words working on the elbow. De-
pending upon, as I say, after each operation it
page 208 } has to be reevaluated and carefully done.

If another procedure would be done, just looking at the over-all picture, it would probably be in the elbow where some of the flexors can be transferred up to the humerus bone. Some of the flexors can be transferred up here to make it a little higher, to give a little better movement, a better fulcrum to pull against.

Q. What will that last transplantation that you mentioned do?

A. That would help give him stronger flexion of his elbow. He has it now, but it would give him stronger. Surprising enough, I do not think anybody really knows all the whys and wherefores, but you can transfer tendons completely. You can take a flexor tendon and put it over on the dorsal or top side of the wrist, and because he is young and all, and nature is a wonderful healer, you can ask him to extend his fingers, they extend the flexors. In other words, in the brain something occurs, I do not know what it is, but it

allows them to train themselves so say for instance you are going to flex your fingers and you say well extend your hand, you say flex a tendon that would ordinarily flex the fingers, and they will do it, these transplantations will come into play.

Q. Dr. May, I understand that you would not recommend those operative procedures for possibly another

page 209 } year?

A. I would say 8 months more, or two years. In other words, the physicians who follow him now know how he has progressed, and if he got to a long static position then I would certainly consider doing it. I wouldn't wait too long. He has good motion in his joints, and he has no deformity of the joints. He can move his joints, or you can move his joints very well. Now, if you wait too long they will have a tendency to stiffen up, and when that occurs then you have an additional problem.

Q. These operations that you have mentioned, are they anything very rare, or is it just a common occurrence?

A. No, these operations are done, they are not uncommon. Particularly in polio children. Also in cases of this kind.

Q. Would that or would that not be an operation that a qualified orthopaedist could perform?

A. I think a qualified orthopaedist could do it. Any qualified orthopaedist could do that, and it certainly could be done.

Q. If those operations were done, what affect would they have upon the necessity of the continuation of that brace?

A. Well, as I say, after each one is done and evaluation is made, and I would certainly use a cast after each procedure to hold the tendons and also the bones in position.

page 210 } Then I would discard it, after the cast was removed and so on. Maybe wear the brace for a while, but eventually get away from the brace. The brace could be discarded.

Q. If those operations were performed and the results obtained that you have indicated would be expected, what would be your estimate of the disability that would then exist?

A. I feel that the boy's disability could be improved, and it would reduce his disability approximately 20 to 25 per cent.

Q. So that if those operations were performed what would you think that his total disability of that arm would be?

A. I feel without any question he will have total disability

to a certain percentage, and I would say approximately, if the procedure and everything went well as we would certainly expect them to do, would probably reduce him to probably 50 per cent permanent disability.

CROSS EXAMINATION.

By Mr. Allen:

Q. Dr. May, you had never seen this boy as I understand it until you examined him I believe on March 18 or 19?

A. March 18 I had not.

page 211 } Q. And you examined him as you stated at the instance of Mr. Sands here for the purposes of giving your opinion here today on the extent of the disability?

A. Yes, sir.

Q. On the witness stand as a witness?

A. Yes, sir.

Q. You did not examine him for purposes of treating him?

A. I did not, sir.

Q. And you did not diagnose the case, either, did you?

A. I think, no, I didn't diagnose the case, but I think that was done originally when he was first hurt.

Q. You undertook to state certain muscles that were good. I take it that you are familiar with all of the nerves and the muscles that serve this left arm and hand and fingers?

A. I would like to state this: I am not a neurologist. However, we do this work, tendon transplants and so forth. Surgical nerve innovations of the musculature I feel I am qualified. I would question myself before I said that I am qualified from an anatomical standpoint to say where each little branch of each nerve leads or serves, because there are many, many, and I have not read up on these recently.

page 212 } Q. Generally speaking, would you diagnose the boy's injury as damage to the brachial plexus, which is a group of nerves of the lower half of the neck which come out of the opening in the spinal column from the spinal cord?

A. I would diagnose him as brachial plexus injury, I would.

Q. I want to get some information from you by way of your opinion as to what the extent of this boy's recovery is and will be. If you diagnosed it as a brachial plexus injury, consisting of a group of nerves that come out from the lower half of the neck, out of the openings in the spinal column

from the spinal cord, would you say that they were in any way severed or torn from the—

A. You want to know whether the nerves were torn say in the cord itself?

Q. No, from the original location, whether separated from it in any way?

A. Yes, I feel the nerves have definitely been torn.

Q. Torn from the cord?

A. He can do certain things that I observed, and I question actually whether they were torn at the cord itself. I question that. He has shown improvement, according to the history that I obtained. A nerve that is in the cord itself as it comes right directly at the cord, does not rejuvenate. This boy has shown some rejuvenation, and I would say that that was a nerve injury rather than a cord injury.

page 213 } Q. Well, let me ask you this: The nerves go into the cord?

A. Yes, sir.

Q. What I am trying to find out is whether they were torn lose from the cord, or whether there was what you call an evulsion?

A. Yes, it was an evulsion.

Q. What is an evulsion?

A. That is the tearing or pulling away.

Q. Pulling away from the cord?

A. Pulling open. Not from the cord.

Q. From where?

A. I think the nerve itself, or the plexus itself.

Q. The plexus is a group of nerves?

A. Yes, sir.

Q. What is it?

A. I think the nerves themselves, in the plexus.

Q. Are pulled away from—

A. Pulling away from themselves.

Q. From themselves?

A. Yes, sir.

Q. Do you know whether or not they were torn from it or pulled from the cord?

A. I do not absolutely know whether they were, but I believe that they were not actually pulled from the

page 214 } cord itself, because he has shown some regeneration.

If they were pulled from the cord itself, then they do not regenerate.

Dr. Virgil Robert May, Jr.

Q. Let's see which of them have shown some regeneration.

A. Mind you, if I am to continue on, sir, even if a nerve is torn in itself, torn in itself, it regenerates. But it may not regenerate all the way down the arm. It may just form a glob there of what we call a neuroma. He wouldn't get regeneration of the muscles.

Q. Now, let's name some of the important muscles and see what has happened to that, in your opinion. Take the deltoid muscle.

A. Well, I think he has a paralysis of the deltoid. The maxilliary nerve, of course, that is part of the brachial plexus. They are branches.

Q. Will that nerve regenerate?

A. It did not.

Q. And will not?

A. I don't feel so.

Q. Now, here is another one with a great long name, caracobrachialis.

A. Oh, caracobrachialis. That is one of the short muscles in the arm. I think names like that are somewhat confusing.

page 215 } Q. They confuse me.

A. They confuse me, to a certain extent, to tell you the truth. Caracobrachialis, that has not regenerated.

Q. Has not?

A. No, sir. That helps with the flexion of the elbow.

Q. How about the biceps muscle?

A. Biceps has in my opinion regenerated partially.

Q. What per cent?

A. I would say, well, just offhand about 35 per cent.

Q. How about the triceps muscle?

A. That has not regenerated.

Q. How about the supinator muscle of the forearm?

A. That has not regenerated.

Q. How about the brachioradialis muscle?

A. The brachioradialis has not regenerated. If I recall correctly it has not.

Q. How about the anconeus muscle?

A. I do not know that one.

Q. That is a long one. You referred to it just now, part of it. Abductor?

A. Yes.

Q. Abductor pollicis.

Dr. Virgil Robert May, Jr.

A. The abductor pollicis is all right. That
page 216 } means moving the thumb, too, moving the thumb.

Q. But that doesn't refer to the arm?

A. No.

Q. How about the extensorindicis?

A. That is the extensorindicis, extensor of the index finger. That is what that means. That is not present.

Q. Can you name any other muscles. I will not go through the whole list, but any of the others that are not paralyzed?

A. That is right. There is no need to go through the whole list of them like that, because, as you say it is more confusing, I think. They are confusing to me, even, frankly. But let's hold the arm out like this, you see. This being the ventral side, this being the dorsal side. The ventral muscles, that has power. The ventral muscles. If you hold the arm like that, the ventral ones, these being the dorsal ones, he has lost the dorsal muscles of his arm.

He has some power in the ventral muscles. Some of them are better than others.

The biceps muscles are partially paralyzed. It is weak. He has no deltoid, which causes you to do this. He has no supraspinatus which causes you to do this. In other words, the deltoid muscle does this, the supraspinatus this, he could do this, he can do this (indicating), which is the serratus
anterior group, and that is also supplied by the
page 217 } brachial plexus.

In other words, major muscle groups is what we work with. We don't work actually down and get into each individual little muscle and trace it out and each individual little nerve and go to the end of it. We don't do that. It is not necessary to do that.

Q. The first one I mentioned was one of the major muscles, was it not?

A. Deltoid? Yes, sir.

Q. Those few I mentioned following that?

A. They are major.

Q. You classify them as major muscles?

A. Yes, sir, I think so. I think one or two of them are in there, we will say they are minor muscles. Another thing I would like to add, too, is the sensory changes in this boy's arm. He has some sensory changes, some numbness. He has good fingertip feeling. That is very good. He is very fortunate to have that.

Q. You said something about his ability to flex his fingers.

A. Uh huh.

Dr. Virgil Robert May, Jr.

Q. Even though he could flex his fingers, his hand is still drooped?

A. Yes, sir, that is right. And if he raises his hand up he can flex them better. Gives you better fulcrum.

page 218 } Q. You talked about the transplanting of the tendons from the inner side of the hand over to the back part of the hand?

A. Yes, sir.

Q. For the purpose of giving him—

A. A better hand.

Q. A better hand?

A. Yes, sir.

Q. Better flexing of fingers?

A. Yes, sir.

Q. But still his hand would drop?

A. That transplantation of tendons itself would tend to still drop, but another procedure would I believe, one I had in mind, would have to be done to correct that.

Q. These procedures that you talk about are in stages?

A. Yes, sir.

Q. And you would not undertake any of them unless the muscle in the hands were strong enough to indicate it?

A. You do not undertake tendon transplants unless you feel that the muscles are strong enough to be transplanted.

Q. Do you feel at this time the muscles are strong enough?

A. I feel some of them are at this particular time. I would say I would wait because I wanted to see if he

page 219 } would turn a little better. However, I do feel, frankly, if he presented himself as I saw him at a later date, say six months from now, and had the same then as he has now, I would certainly consider some transplantation, yes, sir.

I think some of them are strong enough, yes, sir.

Q. There are right many of ifs about that?

A. How do you mean?

Q. You would have to wait, and after you wait it could only be done if there were a certain strength in the muscles?

A. I think there are now. I feel that if he did not improve any more that I would certainly do tendon transplants on him.

Q. For the hand?

A. Yes, sir.

Q. That would be only for the benefit of the hand?

A. That is right.

Dr. Virgil Robert May, Jr.

Q. That would only enable him to flex or move his fingers a little better?

A. That would help him, yes, to flex his fingers, yes, sir. Primarily, yes.

Q. Now, you talked about fusing the shoulder.

A. Yes, sir.

Q. When we speak of fusing we generally speak
page 220 } of fusing bones. What are you fusing?

A. You fuse bones. You are correct in that. The humerus to the scapula, as far as the shoulder is concerned.

Q. How is that going to help restore the damage or repair the damage to the brachial plexus?

A. It will not do that, sir.

Q. It would just give him a little better use of that shoulder?

A. It would give him a better functioning shoulder or arm.

Q. The fusing means you are freezing the part into one position?

A. Yes, sir.

Q. To stay there?

A. Yes, sir.

Q. You cannot give us any definite opinion at this time whether those operations in the several stages would be performed, and if performed you cannot give us any definite opinion as to the success of them?

A. I can only tell you of our experience. I wouldn't do an operation if I didn't think it would help, you know.

Q. I know you wouldn't.

A. I cannot guarantee that, no.

Q. I just want your best opinion. In the first
page 221 } place, you wouldn't do the second one if the first
one didn't turn out all right, would you?

A. No, I would not. Supposing now we did a shoulder fusion, suppose it didn't take, then I would go back and attempt to fuse it again.

Q. You said you would do these operations in stages?

A. Yes, sir.

Q. Wouldn't do them all at one time?

A. Yes, sir.

Q. If you do the first one and it were not a successful one, would you undertake the next one?

A. I would reevaluate it and probably I would wait. I would want to get the first one corrected first. If it did not

turn out I would go after it again, you see, because it can be done again.

Q. Even though it is fairly successful, what does experience show as to the good ultimately that results from those things?

A. It shows that this boy will be able to use his arm better than he does not.

Q. You mean reduce the percentage of disability?

A. I feel it would reduce the percentage of disability.

Q. Around how much, 20 per cent?

A. 20 to 25 per cent. Of course, I am sure as page 222 } to the exact per cent I cannot say.

Q. Assuming that all these operations are desirable in view of the circumstances and reevaluation and examinations and all that, how long a period of time would they cover?

A. They would cover a considerable period of time. They would take approximately two years. Two years. The shoulder fusion, for instance, a fusion operation on any bone when you try to get one bone to freeze to another, takes six months, we will say on the average.

Q. And would any pain and discomfort and hospitalization be involved?

A. Hospitalization would be involved, certainly. He would have pain of course and some discomfort, yes.

Q. And still wind up with approximately as you said 50 per cent disability in the arm?

A. Approximately.

Witness stood aside.

page 223 } O. F. R. BRUCE, JR.,

a witness introduced in behalf of the defendants, first being duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Sands, Jr.:

Q. Mr. Bruce, state your name, age, residence and occupation, please sir.

A. O. F. R. Bruce, Jr., 49 years old, 4804 West Grace Street, Richmond.

I am Chief of Research Statistics and Information with the Virginia Unemployment Compensation Commission.

Q. How long have you been Chief of the Division of Research Statistics and Information?

A. Since January, 1956.

Q. Prior to becoming Chief of that division, what other related positions with unemployment compensation commissions have you held?

A. I was Employment Interviewer starting in 1941 for a year and a half. Then I came to Richmond and was Clearance Supervisor, which means helping people get jobs when they are in Richmond for openings in New York, for instance, or the reverse, for about four months. Then I was a

page 224 } Labor Market Analyst for a year and a half. Then in 1944, October, I was appointed supervisor of employment of the physically handicapped, and I retained that job until January 1956, when I took my present position.

During the time that I was supervisor of employment for the physically handicapped, I was also made supervisor of employment counselling because of the relationship between the two activities, and also supervisor of testing.

Q. Have you at any recent time been engaged in activities related to employment of the physically handicapped other than those to which you have just referred?

A. Yes.

Q. Tell us about that?

A. From 1940, sometime in 1940 the State Committee was formed to further our efforts in helping people with disabilities obtain jobs, and I was elected chairman of that.

Then in Governor Tuck's second year I believe a formal committee, Governor's Committee on employment of physically handicapped, was formed, and I was appointed chairman of that and remained chairman of that through Battle's administration and until January, 1956, when I changed jobs and thought that I should resign.

I am a professional member of the National Rehabilitation Association also.

page 225 } Q. Mr. Bruce, from your experience as you have related, can you tell us how many job classifications are recognized in Virginia?

A. The total number in the Dictionary of Occupational Titles, which is a publication put out by the Bureau of Employment Security and contains 22,000, a little over 22,000 specific, defined jobs.

There are actually 40,000 in there, when you boil it down you will find some of them are alternate titles. There are 22,000 jobs. All of those are recognized in Virginia. But I

wouldn't say that we had all of the occupations in Virginia, for sure.

Q. Of that number approximately how many require apprenticeships?

A. There are approximately 100 basic trades covered by apprenticeships. Now many of those have more than one or some sort of specialty. For instance, in metal working I think there are 8, in photo engraving 3 or 4. Some of them have one, two and up to eight, or perhaps ten.

Probably out of 22,000 occupations between four and five hundred apprenticeships occupy, which would be equivalent to one or more of the 22,000.

Q. In those jobs requiring apprenticeships, are there any which you know of which would be open to persons who suffered the loss of the use of an arm?

page 226 } A. Only two that I know of offhand, commercial artist and draftsman.

Q. Assuming a case in which we have a 13-year-old boy who has lost upwards of 50 per cent, or 50 per cent of the use of his left arm, who is otherwise a normal physical specimen for his age, and who has attained grades in school averaging about the middle of his class, and appears to be bright and alert mentally.

What if anything have you to say as to the probabilities of such a boy being able to embark upon a professional career?

A. That to some extent is a supposition. I know from my experience in our work with the high schools, while I have been supervisor of counseling, we developed the general aptitude test which we use in conjunction with the schools, and test over 50 per cent of the graduating students.

So in their junior year, and some in the senior year that is done to determine aptitude. Students who are in the middle part of their class or above usually apply, and I say usually certainly 90 per cent of them will show aptitudes for college subjects. Such as engineering, medicine, law, school teaching and many other of the professions. Providing this boy continues on in a normal basis and has an opportunity to obtain an education, I see no reason why he should not be able to go into college and obtain a professional standing.

page 227 }

In that same category, there are scholarships open. This new bill, eight hundred million dollars or whatever it is that the Federal Government is going to give away,

is going to make it easier for a boy to get to college. So that a person with a disability, through proper efforts of the Governor's Committee or vocational guidance or through some of the branches of Unemployment Compensation Commission would be enabled probably to obtain financial help in obtaining an education.

I would like to say something about the job structure. I believe you just mentioned professions. The reason I feel it so strongly is because the prime function of the Governor's Committee and on employment of the handicapped is to sell the public on the fact that a person with a disability isn't necessarily useless, that they can do jobs.

The prime reason why more people with disabilities don't have jobs is because employers will not accept that fact. Neither the President's Committee nor the Governor's Committee actually do placement per se, but there are governmental organizations, such as with the veterans, the state employment services, vocational rehabilitation services which actually do the placement of people with dis-
page 228 } abilities, and we know that if we properly evaluate the physical aspects of a job and relate them to the physical capabilities of the individual, and their equal, physical demands do not exceed the physical capabilities remaining to the individual, that he can successfully perform on the job and have just as good a chance as anybody else. In other words, if he isn't lazy or any of the other factors which would throw anybody off the job. But all things being equal he will do as good or better a job, and they have proven that.

Now, out of the 22,000 jobs that are defined over 50 per cent of them are in professions, and in service, in trades which not of themselves require many of them don't require physical capacities apparently remaining to this individual. He would be limited. He would be limited from many manual jobs. He would be limited from the majority of apprenticeable occupations. There is no doubt in my mind as far as that is concerned.

But to say that a boy wouldn't have a chance of getting a job and earning perhaps more money or less money—but anyway a good chance of earning a livelihood because he has a bad arm, is not true.

I have helped place and seen placed people in wheelchairs who cannot get out of their wheelchair, and they are making good enough. They are making enough money to support

themselves without any subsistence.

page 229 } So that it is a relative matter. When you ask what my thinking in relation to a success is, it is a relative matter just as it is with any other 12-year or 13-year-old boy, with not a thing wrong with him. Such things as incentive, aptitude, desire and aggressiveness, all those things play an important part. When you ask that you will have to forget those things and purely do it on the physical.

As far as the physical is concerned, I see no reason why he shouldn't be able to achieve a position in life where he could suppose himself, and decently.

CROSS EXAMINATION.

By Mr. Allen:

Q. Mr. Bruce, I understand you correctly to say that you had difficulty selling employers on the idea that a handicapped boy like this can render good service and he ought to employ him?

A. Yes, sir.

Q. When you do sell them on the idea of employing them, they don't get as good wages as a boy with two good arms and hands, do they?

A. Insofar as I know in the majority of cases, yes, sir. If they perform the functions of the job they get paid the same salary.

Q. If the functions of the job require the use of

page 230 } two hands—

A. We wouldn't try to place them on that job. That is why I said he would be limited as to his job opportunities.

Q. That is right. He would be limited?

A. There is no doubt in the world about that.

Q. And generally his rate of pay would be considerably less, wouldn't it?

A. No, sir, not necessarily. If he was a draftsman I do not see why he couldn't be just as good a draftsman and earn just as much money, or if he were a salesman, why he couldn't be just as good a salesman and earn just as much money as a man with two arms.

Now, we would never try to get him placed as a machinist or in some of the jobs where it is obvious that you need at least to learn the trade involving the use of such dexterity and with both arms and hands. It is a matter, as I said

before, of evaluating the physical potentials of the job, and the physical capabilities of the individual.

The worst thing that we could ever do would be to try to sell a handicapped person to an employer and then send him somebody who was not physically able to do the job, because then you just break down everything you have sold him on.

Q. You referred to draftsmanship?

A. Yes, sir.

page 231 } Q. If a boy hasn't got any use of his left arm or hand, or he is limited to a great extent in the use of *if*, doesn't that affect his efficiency as a draftsman?

A. It might or it might not, depending upon his adaptability.

Q. Because he couldn't hold a ruler and do things like that as well as a man who had both hands?

A. I have seen one-armed draftsmen.

Q. But—

A. I do not know how he would do it.

Q. You cannot say he will do as well as if he had both arms?

A. I cannot say yes and I cannot say no because it depends upon the individual. I am not trying to equivocate.

Q. The ones you have seen.

A. He was doing just as good a job and getting just as much pay in a group of other men who were doing the same job, as far as I could determine.

Q. You said something about a hundred basic trades covered by apprenticeships. What did you mean by that?

A. Oh, electrical work, plumbing, carpentry.

Q. Did you mean that he would have to serve an apprenticeship before he could get in one of those trades?

A. The type of trade where you ordinarily have an apprenticeship, and a man goes in and serves a

page 232 } formal apprenticeship, under some arrangement of that type, whether it happened to come under the Division of Apprenticeship in the Department of Labor and Industry, or whether it is just an arrangement between the individual and the employer, or through a union or whatever it might be.

Q. I am talking about the apprenticeship of the trades, a man serves an apprenticeship preliminarily to going in and getting a job in a trade, say like a sheet metal worker. He would have to serve an apprenticeship, would he not?

A. That is the thing I am talking about.

O. F. R. Bruce, Jr.

Q. Originally would this boy be taken in on an apprenticeship basis to prepare himself as a sheet metal worker?

A. I do not think so.

Q. Was that one of the hundred basic trades that you are talking about?

A. I do not remember specifically whether it is or not. I think a sheet metal worker is an apprenticeable occupation.

Q. In this hundred basic trades you are talking about covered by apprenticeships, would he be taken in in any one to serve an apprenticeship as preparation for receiving a job in the trade?

A. The only two that I can think of are the two
page 233 } that I mentioned, commercial artist and drafting.

Now, there might be others, I cannot say. But those two are two that I can think of. At least, I would see no reason why he shouldn't be accepted.

Q. I suppose you have been here with us in times of unemployment?

A. Yes.

Q. Have you not?

A. Yes, sir.

Q. Where there was great unemployment. I believe they say now that there is some five million men or more out of employment. In these unemployment periods wouldn't the boy, one like this, have difficulty getting a job?

A. If he didn't have one he would, yes. However, we have maintained over a period of several years a percentage equal to the percentage of placements of the total group.

In other words, if we have a thousand applicants applying for jobs, and we place half of them, and we have a hundred handicapped people applying for jobs, we will still place about half of them. So that the ratio is about the same. Now, it requires more effort.

Q. Do you know anything about the aptitude of this boy?

A. No, sir, other than what Mr. Sands said when he asked
the question. In the middle of his class and so
page 234 } forth.

Q. Of course then you haven't given him any aptitude test or anything of that kind?

A. I have never seen the boy.

Q. You do not know whether he has aptitude for the profession that you mentioned, or trade?

A. No. That is why I said it was difficult to answer the question because I do not know anything about his aptitudes, or his intelligence, other than what was in the question.

Witness stood aside.

W. E. BRISTOL,

Virginia State Trooper, a witness introduced in behalf of the defendants, first being duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Sands, Jr.:

Q. Mr. Bristol, what is your full name?

A. William E. Bristol.

Q. Will you state whether or not in pursuance of your duties you were called to investigate an accident in February of last year in which Mr. Fellers was involved

page 235 } with a boy by the name of Clinton Jones?

A. Yes, sir; I was.

Q. Do you know about how long after the accident you arrived on the scene?

A. Approximately 10 to 15 minutes.

Q. Will you state to the jury the weather conditions prevailing at the time that you arrived upon the scene?

A. It was misting raining at that time. It had been raining off and on most of the evening and it was misty and raining—light drizzle.

Q. What would you say about the visibility?

A. Visibility was poor.

Q. What would you say with reference to the surface of the highway at the time? Did I understand you to say it was raining?

A. It was a light misty rain. It wasn't heavy downpour.

Q. What was the condition of the highway?

A. Wet.

Q. When you arrived at the scene will you tell us what you found?

A. I found there had been an accident involving a 1956 Ford station wagon operated by Mr. Fellers had struck the rear or struck a bicycle which had been ridden by Clinton Jones.

page 236 } The accident happened approximately three miles west of Richmond and just east of the state

Route 683, Buford Road, in the vicinity of Sunset Drivein Theatre, in the eastbound lane.

Mr. Feller's vehicle was parked on the right side of the road heading east with the left rear partly sticking out in the driving lane of the highway.

Q. Could you describe to the jury the condition of the shoulder of the road at or about the point of impact?

A. The shoulder itself is dirt. There is a built-up portion of the shoulder of asphalt approximately eight to ten inches wide; and then the dirt shoulder, which was muddy.

Q. It was muddy at the time?

A. Yes, sir.

Q. Did you see any tracks in that shoulder?

A. Yes, sir. I observed bicycle tracks on the shoulder in the mud.

Q. Could you tell the jury going from west to east now, toward Richmond, what course those tracks took?

A. The bicycle tracks were partly obliterated. I couldn't trace them all the way down the road. But they were there, I could see the tracks on the shoulder of the road going approximately in a straight line in the mud, and then they made a slight curve toward the left side, and that

page 237 } is the last I could see or detect any tracks.

Q. That was on which end of the marks?

A. Eastern end.

Q. They made a curve?

A. Just a slight curve toward the highway, and that is the last I could distinguish.

Q. Did you look on the shoulder for any tire marks of any automobile, or any tire marks?

A. I didn't see any in the immediate vicinity of those tracks; no, sir.

Q. No automobile marks?

A. No, sir.

Q. Did you find any marks on the hard surface that you connected with this accident?

A. Not at that time. I went back a day or two days later—I do not recall the exact date—to the scene, and I did observe marks in the highway, light scratch mark in the highway in the same vicinity, approximately a foot to the left of the shoulder of the hard surface.

Q. On the hard surface?

A. Yes, sir.

Q. Approximately a foot on the hard surface?

A. Yes, sir.

Q. Where were those in relation to where the bicycle tracks ended?

page 238 } A. They were in the same approximate vicinity of those tracks. I could not pinpoint those tracks at this time at all.

Q. And the nature of those marks you said were what?

A. Appeared to be some kind of scratch marks like something had been dragged across the surface of the road.

Q. Did you notice to the right of where you saw these tracks or to the right of where the accident happened the condition of the shoulder where it ended? In other words, was there any ditch or depression or anything of that sort?

A. Well, there is a ditch over in there, yes, sir; slight ditch.

Q. Did you notice the state of that at that time, whether it was normal or under repair or what the condition was?

A. I believe they were laying a pipe line at that time through there, if I remember correctly.

Mr. Sands, Jr.: That is all.

CROSS EXAMINATION.

By Mr. Allen:

Q. Mr. Bristol, what time did you get to the scene of the accident that night?

A. Approximately seven o'clock, sir.

page 239 } Q. Who was there when you got there?

A. Mr. Fellers was there, and several other people. I do not know or recall who was there at this time.

Q. Did you see the father of the boy there?

A. I do not recall it, sir.

Q. Did you undertake to locate the point of the contact between these vehicles that night?

A. Yes, sir. But due to all the confusion and the rain it was hard to determine the exact point of the contact. There were no skid marks.

Q. No skid marks of the car?

A. No, sir.

Q. And that night you saw no marks or scratches of any kind up on the edge of the hard surface?

A. I could see no scratches, no, sir.

Q. Did you look around that night at all for that purpose?

A. Yes, sir.

Q. Did you see the Fellers car there that night and if so where was it?

W. E. Bristol.

A. Yes, sir. The Fellers car was, as I said before, off on the shoulder of the road on the right side heading east.

Q. Do you know whether he got stuck over there in the ditch or not?

page 240 } A. Yes, sir. That car did get stuck. We had a vehicle I believe it was from Fred Lloyd's service station, Esso, to pull that vehicle out.

Q. With reference to the visibility that night, did you notice about how far anybody could see that night with the standard automobile headlights?

A. I do not think I could state an exact distance on that, Mr. Allen.

Q. You drove there?

A. Yes, sir. But I couldn't state or give you the distance in feet as to the visibility.

Q. Could you give us an opinion upon how far a man could see running on low beam lights, as the weather was that night?

A. No, sir; I do not believe I could, Mr. Allen. Not an honest opinion, no, sir.

Q. How long have you been driving an automobile, Mr. Bristol?

A. For a number of years now.

Q. You drive at night a good deal?

A. Yes, sir. At night, yes, and I try to drive as weather conditions permit.

Q. You drive in all sorts of weather?

A. Yes, sir.

Q. And you never have noticed how far you

page 241 } could see on your low beam lights driving under weather conditions as they existed that night?

A. No, sir. Visibility was cut considerably.

Q. How much?

A. Well, weather conditions will cut the visibility—probably cut your visibility in half, depending upon the different weather conditions. Different weather conditions can have a lot to do with the visibility.

Q. Do you think that night it cut it about in half?

A. ~~I would say approximately, yes, sir.~~

Mr. Allen: That is all.

W. E. Bristol.

RE-DIRECT EXAMINATION.

By Mr. Sands, Jr.:

Q. Did you examine the bicycle for any rear lights?

A. Yes, sir.

Q. Or reflectors?

A. I did, sir. I examined it for a reflector, and there was none on the fender. It is the only place I looked for a reflector on that bicycle was on the rear fender of it.

Q. Was there one?

A. There was none on the bicycle.

Q. Did you make a search of the area?

page 242 } A. Yes, sir, I did. I never could find one. I was informed there was one on there, but I never could locate one on there.

By the Court:

Q. When you got there was the boy still there, or had the ambulance taken him away?

A. I do not recall, Judge. It seems to me the boy was gone when I arrived. I am not certain about that.

Q. Do you recall his mother being there?

A. No, sir. Only recall the only recollection I have of either of his parents was at the hospital. I went down after I left the scene.

RE-CROSS EXAMINATION.

By Mr. Allen:

Q. You said you examined the bicycle. Let me show you these photographs of the bicycle and see if you can find any light on that.

A. All right, sir.

Q. I hand you Plaintiff Exhibit 3. See if you find any evidence of any light on there?

A. Yes, sir, I do, on the left rear wheel on the fork. There is evidence of a light having been there, sir.

Q. You didn't see it that night?

A. No, sir, I did not. As I said, the only thing

page 243 } I looked for at all was a reflector. I didn't look for a light on the rear of the bicycle.

Q. Now, I notice something on the fender of that bicycle near the end of the back fender. Do you see anything there indicating any reflector of any kind?

A. I can see what appears to be a screw in the center. That is the only thing.

Q. Do you recognize that picture which I showed you as a picture of the bicycle?

A. Yes, sir.

Mr. Allen: That is all.

Witness stood aside.

ROGER L. JONES,
being recalled, testified further as follows:

DIRECT EXAMINATION.

By Mr. Sands, Jr.:

Q. Mr. Jones, do you know what color clothing your son had on the night of the accident?

The Court: If you are doubtful about that, page 244 } don't answer it. Maybe Mrs. Jones would know better.

A. I am not positive, Your Honor.

Witness stood aside.

MRS. MADELENE R. JONES,
being recalled, testified further as follows:

DIRECT EXAMINATION.

By Mr. Sands, Jr.:

Q. Mrs. Jones, just one question. Can you tell us what color clothing Clinton had on the night of this accident?

A. Well, he had on a kind of a jacket like you have on, except it had a quilted effect.

Q. About this color or about like this, just about the color I have on?

A. Just about the color you have on.

By the Court:

Q. What color would you call that?

A. Doggone if I know. Between a blue and greyish blue,

I reckon. And he had on a pair of bluejean pants, more blue than it was greenish.

page 245 } By Mr. Sands, Jr.: (Continued)

Q. Would you say they were dark-colored clothes?

A. I would say they were.

Mr. Sands, Jr.: That is all.

CROSS EXAMINATION.

By Mr. Allen:

Q. Did he have on a hat?

A. Yes.

Q. What kind of hat?

A. He had on the kind of hat that has the thing around where you turn it down and pull it over your ears.

Q. Was it bright colored or dark colored hat?

A. Bright.

Witness stood aside.

page 246 } MARVIN A. FELLERS,

a defendant, having been recalled, testified further as follows:

DIRECT EXAMINATION.

By Mr. Sands, Jr.:

Q. Mr. Fellers, you testified on yesterday and gave some of the facts. Will you give your full name and your age?

A. Marvin A. Fellers, 41.

Q. Where is your home?

A. Route 9, Box 158, Richmond.

Q. Married?

A. Yes, sir.

Q. I believe you stated that you are president of the Aluminum Window & Door Corporation?

A. Yes, sir.

Q. Who organized the corporation?

A. I did.

Q. About how long ago?

A. August 1952.

Q. How many of you own the stock?

Marvin A. Fellers.

A. I and one other man.

Q. You all are in the business of—I guess the name indicates the business?

page 247 } A. That is right. We make aluminum windows and awnings.

Q. On the night of this accident I think you went in—I am going over probably some of this a little bit, but I will try not to. Will you describe the weather conditions the night of this accident?

A. It was foggy, misty, and it wasn't raining too hard just at the time of the accident.

Q. What would you say as to visibility?

A. It was very poor. It was at least fifty per cent less than normal.

Q. I believe that you stated before you were driving on low beam at the time?

A. Yes, sir.

Q. What can you say as to traffic approaching you if any on the highway?

A. At that particular time of evening it was quite a few cars on that particular evening going west. And just after the accident it was quite a lot of traffic that came along going east.

Q. Just before you reached the boy where this accident happened, can you tell us about what speed you were driving?

A. Well, I estimated 45. It is possible that I was doing less than that. But that is the average speed that I

page 248 } drive to and from home on that road, and in normal times I never get over that.

Q. What is the limit on that road?

A. 55.

Q. At that point?

A. Yes, sir.

Q. Could you tell us how many lanes are in the eastbound section?

A. Two. Driving and passing lane.

Q. Where were you driving?

A. I was in the double lane, which is the right-hand lane.

Q. Could you tell us about how far you were from the shoulder?

A. I would say from two to three feet.

Q. I believe you stated that your lights were at the time on low beam?

Marvin A. Fellers.

A. Yes, sir.

Q. At the time that you first saw the bicycle or the rider, about how far were they from you, and what was the movement of the bicycle at that time?

A. When I first glimpsed it it was on a slight angle coming into the highway, and it was very close to me. I would estimate from 20 to 30 feet. And I didn't have time to do anything—in other words, I hit it.

page 249 } Q. Did you attempt to apply your brakes?

A. Of course. I attempted to apply my brakes, because I stopped a very short distance from where the bicycle was lying to where my car was stopped.

Q. Where was the bicycle lying after the accident?

A. On the shoulder of the road.

Q. How close would you say to the hard surface?

A. Well, the way it was mangled up, it was I would say taking up possibly the biggest part of the four-foot shoulder. It was close to the edge of the hard surface part of the road, the bicycle was.

Q. Right after the accident what did you do as soon as you got out?

A. As soon as I got out I heard the kid crying. I went back to the car to get my flashlight, but couldn't find it because it was so dark I couldn't see where he was. And then a car came along and I tried to flag him down, and he didn't stop. So I walked back up the road near this pole and he was getting up out of the ditch. So I went over in the mud and brought him up into the highway.

About that time a truck came along and I was holding him in an upright position, and I flagged the truck and it stopped. Went over to the service station. I asked him to call the Manchester Rescue Squad and the State Police to the scene.

page 250 } I was still holding the kid when two men came down—don't know who they were, I presume from the service station.

It was then it began to rain more heavily, and then I opened the back doors on my station wagon and laid the kid on the back seat.

Q. Then the condition of the shoulder and the ditch immediately adjacent to the shoulder was what?

A. I mired up in mud about half way to my knees when I went over in the ditch to get him out, because they had just recently put in a storm drain or water main, I do not know which.

Marvin A. Fellers.

Q. Did your car at any time prior to this accident leave the hard surface?

A. Not until after the accident. My right front wheel went off about a foot or two feet off of the hard surface when I stopped.

Q. At the time you stopped?

A. Yes, sir.

Q. Prior to the time of the accident, were you at any time?

A. No, because it had been raining for several weeks and it would have mired up.

Q. Where is the automobile that was in this
page 251 } accident?

A. I have it parked out front.

Q. Have there been any changes made in it since the accident?

A. No.

Q. To the front end, I mean.

A. No.

Q. Was there that night that you noticed, or the next day, any evidence on the front of your car that would indicate the point of impact on your car?

A. Yes, sir. The insurance adjuster and myself looked at it the following day, the following morning. We found one little round dent, where a bolt or something made just one little round indentation in the bumper. That was the only part of the car that was touched.

Q. How far was that from the corner of the bumper?

A. Actually from the extreme edge of the bumper it was 7 inches.

Q. Have you made any tests to determine how far the edge of your bumper extends past your wheel?

A. Yes, sir, I did this morning.

Q. Will you tell the jury the way in which you made the test?

A. I drove my car wheel up to the edge of the hard surface, the extreme edge.

Q. Where did you make the test?

page 252 } A. At the scene of the accident as close as I could estimate as to where it happened.

Q. All right, sir.

A. I took a plumb bob and dropped it down by the edge of the bumper and a rule and measured over to the tire and it was five inches.

Then I took the plumb bob from this little indentation and

dropped it down to the surface and that was two inches from the edge of the surface, making it 7 inches from the extreme edge of the bumper.

Q. In other words, then, according to your measurements and calculations made in this way, the very outside of your bumper was five inches from the edge of the hard surface?

A. That is right, sir.

Q. Is that correct?

A. That is right.

Q. And the point at which you have indicated you found this little dent was 7 inches from the point on the shoulder where your bumper would have extended when your wheels were on the edge of the hard surface?

A. That is right.

Q. So that if your wheels were right on the edge of the hard surface then your outside bumper would have been extending how far on the shoulder?

A. Five inches.

page 253 } Note: At this point during the trial a short recess is had, and a conference in Chambers, viz:

In Chambers.

The Court: I noticed that the witness under direct examination probably inadvertently referred to his insurance agent, and I simply want to take extreme caution to caution counsel for the plaintiff in their cross examination in connection with this mark if they do cross examine him about any mark not to ask any question that would prompt this man to make the same statement.

During this recess I am going to ask that counsel for the defendant get the witness and advise him on cross examination he is warned not to mention anything about any reference to any insurance agent. I will ask you to do that now.

Mr. Allen: We will certainly not mention it, and we will avoid it, Judge.

page 254 } Note: Counsel now confer with the witness, following which the hearing is resumed before the jury, as follows:

Before the jury.

Marvin A. Fellers.

CROSS EXAMINATION.

By Mr. Allen:

Q. Mr. Fellers, I believe I understood you to say on yesterday that your visibility was cut down about half by reason of the weather conditions that night?

A. Yes, sir.

Q. And you still drove at approximately forty-five miles an hour?

A. At a maximum of 45; yes, sir.

Q. You said on yesterday approximately 45, and in answer to your interrogatories you said approximately 45. Do you want to change it?

A. No, 45.

Q. That is your best judgment that you were driving approximately 45 miles an hour?

A. Yes, sir.

Q. Is that right?

A. Yes, sir.

Q. You never did see this boy on the hard surface, did you?

A. Sir, he was on the hard surface when I saw

page 255 him.

Q. On the hard surface when you saw him?

A. On an angle coming up into the highway.

Q. Well, now, I want to ask you: Do you remember being asked in some questions which you were requested to sign under oath the question: "State the direction in which each of the vehicles was traveling when the operator first saw the bicycle." That is the direction that you were traveling and the direction the bicycle was traveling when you first saw the bicycle.

A. Eastward.

Q. Do you recall being asked that question in the interrogatories?

A. Yes, sir.

Q. And didn't you give this answer: "Both vehicles traveling in generally easterly direction"?

A. That is right.

Q. And you did not say anything about the man turning left in front of you?

A. I didn't say he turned left. I said he was on a slight angle coming into the highway. That would mean that he would be going in an eastwardly direction.

Q. You didn't, when you were asked under oath to answer

about the directions, you didn't say anything about the angle?

A. That is why I put it eastwardly instead of page 256 } east.

Q. All you said was general easterly direction?

A. Yes, sir.

Q. That is all you said?

A. Yes, that is why I put it that way.

Q. So then the boy was in your view on the hard surface for approximately 20 to 30 feet?

A. That is correct.

Q. And you kept straight going, you didn't turn your automobile in either direction?

A. I had approximately a second to do anything.

The Court: The question was, did you turn in either direction.

A. (Continued) That I can't say. I actually can't say what I did in that short length of time.

Q. You have already testified that you, if you had seen him in time, you would have turned to the left and avoided him?

A. I would have.

Q. So the natural impulse was to try to turn to the left?

A. That would have been.

Q. You do not know whether you did turn a little to the left or not?

A. I do not know.

page 257 } Mr. Allen: That is all.

Witness stood aside.

Mr. Sands, Jr.: That is our case with one exception, sir. We have the automobile outside. We are not going to ask for a view. If the jury cares to see it it is there. I am sure Mr. Allen has no objection to that.

Mr. Allen: No objection to them seeing it if they want to.

Mr. Sands, Jr.: With that, that is our case, sir.

The Court: Will there be a lengthy rebuttal?

Mr. Allen: Very short, if Your Honor please. But you do adjourn at one o'clock for lunch?

The Court: I just wondered about the jury, is the reason

I was asking that. There is no use for them to be sitting around while we are getting the instructions in order.

Mr. Allen: If you will give us just a minute
page 258 } we can determine whether we have any rebuttal or not.

The Court: I think that would be helpful to the jury.

Note: Following a short conference, Mr. Allen states as follows:

Mr. Allen: We have no rebuttal except, if Your Honor please, I would like to ask permission to read the one question and answer from the interrogatories that I asked him about.

The Court: Go ahead.

Mr. Sands, Jr.: No objection. I thought counsel had already asked the witness about that.

The Court: I thought you had asked him, but go ahead.

Mr. Sands, Jr.: No objection.

Mr. Allen: I think it ought to be in.

The Court: Go ahead and read the question and answer if you wish.

Gentlemen of the jury, prior to the day of the trial of the case certain questions were asked. We have a procedure in Virginia whereby either side may ask the other side certain questions, certain proper questions, and if there is any question about the impropriety of the question
page 259 } they get the Court to rule on it. With reference to the question in this case there is no such controversy. The plaintiff asked several questions of the defendant, and the defendant answered them, and Mr. Allen wants to read you one of those questions that was propounded and read you the answer which the defendant made to it.

Mr. Allen: I might state that they were answered under oath.

The question is No. 8. "State the direction in which each of the vehicles was traveling when the operator first saw the bicycle." The answer is: "Both vehicles traveling in general easterly direction."

The Court: Is that the case?

Mr. Allen: Yes, sir.

* * * * *

page 261 } Monday, March 24, 1958.
9:30 o'clock A. M.

Third day of the trial.

In Chambers.

The Court: I wish to say to counsel that I will give instructions which permit the case to go to the jury on the following issues in addition to the routine ones:

One. That the plaintiff can recover whether struck on the shoulder or on the hard surface.

Two. That the capacity of the plaintiff is one of fact for the jury.

Three. Upon the doctrine of sudden emergency, and if the plaintiff requests it upon the allied doctrine of last clear chance.

Four. Upon the common law duty of the defendant to have proper light ahead, if the plaintiff requests it, but not upon the Virginia statute on headlights.

Five. Upon the duty of the infant plaintiff to obey statutes if he has the capacity,

a. with respect to moving from the shoulder
page 262 } to the hard surface.
b. with respect to bicycle lights and reflectors.

The principal cases relied on by the Court are *Neal* v. *Spencer,* 181 Va., 868.

Piccolo v. *Woodford,* 184 Va., 432.

Although I have not used the language of the instructions therein, because it appears that the Supreme Court of Appeals may have had some misgivings about the language of the instructions therein when it said:

"The instructions granted by the Court were not the subject of any exceptions. Upon the elementary principles we accept them as the law of the case."

McGowan v. *Taymon,* 144, Va., 358.

Gough v. *Shanner,* 197 Va., 572. On infant's capacity to violate statutory duties.

Laubach v. *Howell,* 194 Va., 670, on the duty on coming from the shoulder onto the hard surface by a bicycle is the movement governed by Section 46-183 of the Code.

See p 17

Mr. Sands, Jr.: At this point, sir, might the defendant renew its motion which was made at the conclu-
page 263 } sion of the evidence of the plaintiff that the evidence of the plaintiff be stricken on the grounds that the planitiff was guilty of contributory negligence as a matter of law.

This motion is made with the full realization of the limitation upon an infant to be guilty of contributory negligence, but we contend that in this case the physical facts establish without any question and that there is no evidence of probative value to challenge it, that the bicycle swerved onto the hard surface immediately prior to the impact.

This being established by the uncontradicted testimony that the tracks of the bicycle on the shoulder went up almost to the point of impact, and then disappeared, and this coupled with the absence of automobile tire tracks on the shoulder conclusively establishes the impossibility of a collision on the shoulder to force the Court to this conclusion.

The Court: The motion is overruled.

Mr. Sands, Jr.: We except for the reasons stated.

Mr. Allen: We wish to make some general
page 264 } objections before stating our objections to the specific instructions.

We object to any instruction being given on behalf of the defendant on the subject of the liability of the defendant upon the ground that the defendant's own evidence shows that he was guilty of negligence, and we object to any instruction being given submitting to the jury the issue of the plaintiff's contributory negligence, because there is no evidence in the record to show that this boy was more advanced or more mature and more intelligent than any other boy his age, and in order to convict him of contributory negligence evidence would have to be produced by the defendant from which the jury could infer this boy was more intelligent, better developed, more mature and more experienced than the average boy of his age.

Objections and exceptions to Instructions.

Mr. Allen: We object and except to the action of the Court in refusing to give Plaintiff's Instruction
page 265 } No. 8 on the ground that under Code Section 46-277, and 46-279, and the cases of *Barry* v. *Tyler,* 171 Va., 381, and *Nicholson* v. *Strout,* a Virginia case later decided by the United States Court of Appeals for the Fourth Circuit, and the facts in this case, the instruction should have been given because it was the duty of the defendant to operate

upon the highway with high beam lights, it being on a dual highway and meeting nobody on that side of the highway, and passing no automobile, and no automobile to his left, and without waiving our objection to the action of the Curt in refusing to give our Instruction No. 8 we ask the Court to give its Instruction No. 3, which is not as favorable to us as we think we are entitled to under the law, but is the best we can get.

We object to the action of the Court and note our exception in the Court's giving Instruction No. 2 because it uses the words "sole proximate cause." Should the jury find that the boy is not capable of contributory negligence, and find that the actions of the boy, which otherwise would be page 266 } called contributory negligence, and the negligence of the defendant concurred to bring about the accident they could not find for the plaintiff under this instruction.

The defendant's negligence does not have to be the sole proximate cause of the injury if the plaintiff so negligent was found not capable of committing contributory negligence.

The Court: May the Court insert the thought here that had occurred to me in the preparation of these instructions: My conception of the use of the phrase "sole proximate cause" means legal cause, and therefore the other instructions of the Court adequately protect the plaintiff.

Mr. Allen: As to Instruction No. 3, the plaintiff however objects and excepts to the use of the word "sole" in that instruction for the same reason given to the previous instruction to the use of the word "sole" in the previous instruction.

As to Instruction No. 4, the word "sole" is again used in Instruction No. 4, and we object and except to the use of that word for the same reasons given for the use of page 267 } the word in Instructions 2 and 3.

The plaintiff by counsel objects and excepts to the action of the Court in refusing to grant Plaintiff's Instruction No. 11, upon the ground that it is applicable to the evidence in this case and contains a correct statement of the law.

This instruction was given as Instruction No. 10 in *Piccolo* v. *Woodford,* 184 Va. 432. It is just as applicable to this case as it was to that, and the plaintiff objects and excepts to the action of the Court in refusing to grant it. The Court having indicated upon refusing this instruction that it will grant Instruction No. 5 in lieu thereof if requested so to do, counsel for the plaintiff requests the Court to give Instruction No. 5 without waiving plaintiff's objections and exceptions to the

action of the Court in refusing to give Instruction No. 11.

The Court: I will give Instruction No. 5 either in the language that I have prepared it in, or in any similar language that does not change the tenor of it, if the plaintiff has any suggested changes.

page 268 } Mr. Allen: In view of the principles of law which the Court has announced that it was guided by in redrafting the instructions, we do not believe we can make any suggestion to improve the instructions as far as the plaintiff's side is concerned without running counter to those principles, but we do object to the use of the word "sole" in this instruction for the same reasons that we have objected to the use of the word "sole" in previous instructions, and we do not think the question of emergency should be presented to the jury by this or any other instruction due to the fact that the defendant's own evidence shows that he was guilty of negligence in operating the car at 45 miles an hour according to his usual method of operating the car along that highway, notwithstanding the fact that his visibility was admittedly cut down one-half, and that he did not blow his horn and that he was negligent as a matter of law in not seeing the child on the bicycle sooner than he did.

The Court: May I interrupt you to say that the Court may have likewise been prompted to use the word

page 269 } "sole" in these instructions by the use of that word by the plaintiff in his tendered Instruction No. 7 taken from the Piccolo case, and his tendered Instruction No. 8 taken from the *Barry* v. *Tyler* case. Also the Court desires to make it clear that under the instruction which the Court has given counsel for the plaintiff is permitted fully to argue as one of the possible things that the defendant may have done in the emergency was to sound his horn, or any of the other acts that the plaintiff may think were proper for the defendant to have done.

Mr. Allen: We think under the circumstances the use of the word "sole" being used so many times that the Court should instruct the jury what it means by the use of that word "sole" so that the jury may be told that even though conduct of the plaintiff was such as to constitute contributory negligence ordinarily yet if the jury finds that he did not have capacity to commit contributory negligence then the conduct of the defendant in a legal sense would be the sole proximate cause of the accident.

The Court: The Court believes the last com-

page 270 } ment of counsel for the plaintiff is covered in the Court's Instruction No. 8, the last line, where the Court says "unless the defendant proves such capacity

you cannot deny the plaintiff recovery on the grounds of alleged contributory negligence."

Mr. Allen: Counsel for the plaintiff objects and excepts to the action of the Court in giving Instruction No. 7 referring to violation of statutes, and referring to adults and infants between 14 and 21 as tending to confuse a jury.

Counsel for the plaintiff objects and excepts to Instruction No. 9 upon the ground that it refers to an adult in connection with the plaintiff and might mislead the jury.

Counsel for the plaintiff objects and excepts to the giving of Instruction No. 13 upon the ground that there is no evidence to support it. On the contrary the evidence of the defendant himself shows that he was guilty of negligence as a matter of law.

page 271 } Plaintiff by counsel objects and excepts to the action of the Court in refusing to grant Instruction No. 15 requested by the plaintiff. There is evidence brought out I think by counsel for the defendant about the plaintiff's mother sending the boy to the store on the bicycle on a rainy, bad night, and we think the instruction should tell the jury that that evidence has nothing to do with the issue involved in this case.

Moreover, there is no test in any of the instructions as to how the jury is going to determine whether the boy is capable of being guilty of contributory negligence, and we think that test is correctly stated in Instruction No. 15, that if the boy is nothing more than an average boy, and acts like an average boy, then as a matter of law he was not guilty of contributory negligence.

Counsel for the plaintiff objects and excepts to the action of the Court in giving Instruction No. 14 upon the ground that it doesn't submit the case to the jury on the preponderance of the evidence rule, and also leaves out circumstantial

page 272 } evidence, and actually it is subject to objection also upon the ground that there is no basis in the evidence for giving any such instruction in view of the defendant's testimony making him liable as a matter of law.

These sympathy and speculation instructions have been several times criticized by the Supreme Court, and we think they should not be given. Every verdict to some extent is bound to be based on conjecture because it cannot be arrived at by a definite scientific knowledge, and when you tell a jury the verdict cannot be based upon conjecture it is going too far.

The sympathy part of the instruction I believe was criticized in a case in 195 Va., 340, 78 S. E. 2nd, 699. We believe

it is time for the Courts to stop giving an instruction in that language.

Plaintiff by counsel objects and excepts to the action of the Court in giving Instruction No. 15 upon the ground that it doesn't distinguish between a child and an adult.

page 273 } Counsel for the plaintiff objects and excepts to the action of the Court in giving Instruction No. 16 upon the ground that there is no basis in the evidence for giving an instruction to the effect that the jury if it believed from the evidence that the defendant Fellers was operating his vehicle immediately prior to the accident in a careful and prudent manner, and that the plaintiff swerved suddenly onto the highway and Fellers was thereby confronted with a certain emergency, in the first place the defendant by his own testimony was negligent as a matter of law, and could not have been operating his vehicle carefully.

In the second place, there is no evidence in the record that the plaintiff swerved suddenly on the highway. The defendant testified that when he saw him he was at a slight angle, and as far as any emergency is concerned, if one was created, it was self-imposed. That is brought upon the defendant by his own failure to keep a proper lookout and to keep his car under proper control.

page 274 } Plaintiff excepts further to the giving of Instruction No. 17 upon substantially the same grounds that were urged against Instruction No. 16. The defendant failed as a matter of law to exercise ordinary care upon his own evidence. He failed to keep a proper lookout upon his own evidence, and if he had been keeping such a lookout the bicycle and the boy upon it would have been in plain view, according to his own testimony, which would have enabled him to slow up or swerve and miss him. There is no basis in the evidence for giving any instruction such as No. 17.

Plaintiff by counsel objects and excepts to the Court's action in granting No. 18 upon the ground that there is no evidence to support it, and the statutes referring to it do not apply so long as the child remained where he had a right to be. Furthermore, there is no evidence in the record to rebut the presumption that the boy was not capable of committing contributory negligence.

Plaintiff by counsel objects and excepts to the granting of Instruction No. 19 upon the ground that there is no evidence to support any instruction that the bicycle was not equipped with both front and rear lights as the law requires,

and a reflector. The defendant himself only
page 275 } testified that he didn't see the lights, which was
mere negative evidence and could not overcome the testimony of the plaintiff himself and the plaintiff's father on the subject of the lights.

Plaintiff by counsel objects and excepts to the granting of Instruction No. 20 upon the ground that there is no basis in the evidence for submitting to the jury the question of the plaintiff's capacity to commit contributory negligence, and there is no evidence to show that he was guilty of contributory negligence if he was capable.

Here begins objections and exceptions by the defendant.

Mr. Sands, Jr.: Counsel for the defendant objects and except to the action of the Court in granting any instructions offered by the plaintiff upon the grounds that there is no
evidence to support them in this case.
page 276 } Specifically, counsel for the defendant objects
and excepts to the action of the Court in granting Instruction No. 1, particularly as to that portion of Instruction No. 1 embodied in the last two and a half lines "or on the right edge of the hard surface," upon the ground that the plaintiff's entire case is predicated upon the theory that he was struck on the shoulder. Both plaintiff and his witnesses having any knowledge of the physical facts have testified that he was struck upon the shoulder, and that therefore to permit the plaintiff to recover upon the theory that the accident occurred upon the hard surface would be allowing him to predicate a recovery upon a state of facts wholly inconsistent with his own evidence. Under the doctrine of *Massey* v. *Firmstone,* and subsequent cases affirming the principle therefore set out, the plaintiff could not be allowed to recover upon such inconsistent theory.

That same objection and exception will go to the action of the Court in its refusal to grant Instruction No. 1 offered by the defendant, and exception therefore will not be taken
at the time that particular instruction comes up.
page 277 } I will put it in at this time, on the same grounds.
We have no objection to Instruction No. 2 other than the general objection that there is no evidence in this case to support it.

Counsel for the defendant objects and excepts to the action of the Court in granting Instruction No. 3 upon the basis that the defendant's duties as to the maintenance of light and as to the operation of his vehicle with reference to lights is defined specifically by Virginia Statute, that under this

statute it was the duty upon the defendant to operate his vehicle upon low beam when meeting any other vehicles, and the undisputed evidence in this case is that immediately prior to the accident complained of that there were several vehicles approaching the defendant from the opposite direction and which he was therefore meeting, in contemplation of the language of the statute.

Under these circumstances there being a statutory duty imposed this instruction which is predicated upon a common law duty in the absence of statute should have no application.

page 278 } Defendant by counsel objects and excepts to the action of the Court in granting Instruction No. 4 offered by the plaintiff upon the ground that this instruction while it would be proper in daylight and might be proper under normal conditions at night is certainly improper under the evidence in this case, for while there might have been a duty to see a cyclist under the evidence in this case it would have been a physical impossibility for any motorist to have determined the age of a rider under the then circumstances prevailing, and the most that any operator of a vehicle could have done would have been to have determined that there was a bicycle and a rider thereon. It would be a physical impossibility for any driver under the conditions that existed at this time when a bicycle could have come into view to have arrived at any determination as to the age of this rider.

Counsel for the defendant objects and excepts to the action of the Court in granting Instruction No. 5. This is the last clear chance instruction. There is no evidence of any character in this case to justify the granting of a last clear

page 279 } chance instruction, but on the contrary the undisputed evidence is such as to viciate any of the requirements or conditions precedent to the granting of the last clear chance instruction. The unquestioned evidence in this case is that the bicycle was upon the shoulder until immediately prior to the impact.

There is no evidence to the contrary, and the physical facts establish this beyond a per adventure. This being true regardless of defendant's negligence in other respects there was certainly no opportunity for him to have observed a condition of peril for there was no condition of peril existing under the physical facts in this case until the bicycle left the straight course, as borne out by the tire marks, and swerved onto the highway, and this by the evidence was immediately prior to the accident.

Counsel for the defendant objects and excepts to the granting of Instruction No. 6 upon the ground that this instruc-

tion ignores the unquestioned evidence in this case that the bicycle swerved suddenly onto the highway. The same argument concerning this feature of the exception is applicable as to the preceding instruction.

page 280

Counsel for the defendant objects and excepts to the action of the Court in granting Instruction No. 7, upon the ground that under the evidence in this case the plaintiff should have been held guilty of contributory negligence as a matter of law, and certainly in view of his mother's testimony as well as his as to the known danger of being on the hard surface of this particular highway, that there would be no room for a finding that because of his age he did not know or didn't appreciate the danger when by his own testimony and that of his mother it had been specifically called to his attention.

Counsel for the defendant objects and excepts to the action of the Court in granting Instruction No. 8 upon the same ground assigned to the granting of Instruction No. 7.

Counsel for the defendant objects and excepts to the action of the Court in granting Instruction No. 9 upon the ground that while it correctly states the principles of law there is no evidence in this case to support it.

page 281

We have no objection to No. 10.

We have no objection to No. 11.

We have no objection to No. 12.

All of these of course subject to the general objection and exception that there is no evidence to support them.

Counsel for the defendant objects and excepts to the action of the Court in refusing Instruction No. 1 and has already stated his grounds therefor.

Counsel for the defendant objects and excepts to the refusal of the Court to give Instruction, Alternate Instruction without waiving its objection and exception to the failure of the Court to give Instruction No. 1, objects and excepts to the failure of the Court to give Instruction No. 1 *Alternate* as offered upon the ground that it correctly stated the principle of law involved.

page 282

Counsel for the defendant objects and excepts to the refusal of the Court to grant Instruction No. 7 as offered upon the ground that it correctly stated the law applicable.

Counsel for the defendant objects and excepts to the action of the Court in refusing to grant Instruction No. 8 as offered upon the ground that it correctly stated the law applicable.

Counsel for the defendant objects and excepts to the action of the Court in refusing Instruction No. 10 as offered, upon the grounds that it correctly states the law applicable;

that one of the prime issues in this case is going to be a question of appreciation of danger by the infant, and upon this point it would be violative that he not only had received warning and instructions from his mother concerning this particular danger, but that he had full appreciation thereof.

page 283 }

Counsel for the defendant objects and excepts to the action of the Court in refusing to grant Instruction No. 9 as offered by the defendant upon the grounds that it correctly states the applicable principle of law involved, and for this reason should have been given as offered.

The instruction as offered stated that the jury should consider this instruction in the light of other instructions, and such other instructions specifically have defined the limitations and the conditions under which an infant can be found guilty of contributory negligence.

Further objections and exceptions stated by counsel for the plaintiff.

Mr. Allen: Counsel for the plaintiff objects and excepts to the giving of Instruction No. 21 upon the ground that there is no basis in the evidence for giving any instruction based on contributory negligence of the plaintiff, and further upon the ground that the instruction if given should include immediately after the language "capable" of committing contributory negligence, and further believed that he in fact was guilty of committing contributory negligence, then such contributory negligence of the plaintiff and the negligence of the defendant concurred to bring about the accident would require a verdict for the defendant. The instruction is objectionable for another reason, that the evidence shows as a matter of law that the defendant was guilty of negligence, and there is not sufficient evidence in the record to rebut the presumption that the plaintiff was not capable of committing contributory negligence, or if capable that he was in fact guilty of contributory negligence.

page 284 }

Here ends objections and exceptions to the instructions.

Note: At this point Court and counsel return to the Courtroom, and are before the jury at 11:17 a. m., viz:

page 285 } Jury in.

The Court: Gentlemen of the jury, in every law case there

are two cardinal elements, one is called fact, the other we call the law.

The facts you have heard, consisting of the evidence of the witnesses and the various exhibits that have been introduced. Concerning those facts under our system of jurisprudence you gentlemen of the jury are the sole judges of what they prove.

Concerning the law it is the Court's responsibility to draft statements of the law governing the particular type of case being tried, put those instructions in writing and read them to you and give them to you to guide you in determining what verdict you shall reach after you have determined what the facts are in the case and apply this law according to the proven facts.

The instructions of the Court are 21 in number, and I am now going to read them to you. You will have the privilege of taking them to your jury room. Counsel will no doubt comment on most of them during the course of the argument, but in order that you may more clearly appreciate
page 286 } the argument of counsel, I will ask you to give your attention to this reading of them by the Court at this time:

Note: At this point the written instructions are read to the jury by the Court, following which the opening argument is first made by Mr. Maurice, following which the Court adjourns the jury for lunch, without objection, with the following instruction:

The Court: Gentlemen of the jury, it is awkward that we have a recess for lunch in the middle of an argument. I will just have to ask you to bear with us and retain the argument that Mr. Maurice has just given you, and after lunch you will pick it up as though you heard it all at one sitting.

So we will recess now for lunch. Let's try to be back at 1:45. That will give you 45 minutes. You are excused until 1:45. During the luncheon recess you gentlemen of the jury will be very careful not to talk with anybody or let anybody talk with you about this case. You of course will not talk among yourselves about it in view of the facts we are in the middle of argument. Be back at 1:45, gentlemen.

page 287 } Note: Recess is now had for lunch, the time of return being at 1:15 instead of 1:45, as an error was made in stating the time to the jury.

Thereupon counsel for the defendants both argue to the

jury, following which the closing argument is made to the jury by Mr. Allen.

All arguments being completed at 3:02 p. m., the Court states as follows:

The Court: Gentlemen of the jury, you will retire to your jury room, take with you the motion for judgment filed in behalf of the plaintiff in this case, the grounds of defense filed on behalf of the defendants in this case, the exhibits introduced during the course of the evidence, the instructions of the Court, and write your verdict on this blank yellow sheet of paper.

I will say to you gentlemen of the jury if during any of the course of your deliberations in the jury room you desire to take a recess, during such recess you will not debate the case and you will not debate it at all unless all seven of you are together at the same time.

page 288 } Note: Jury retire to the jury room at four minutes after three p. m.

Note: At 4:10 p. m. the jury announces itself ready, and is brought into the Courtroom as follows:

The Clerk: Have you gentlemen reached a verdict?

A Juror: We have.

The Clerk: May I have the verdict, please, sir?

Note: Verdict is handed to the Clerk.

The Clerk: We the jury on the issue joined find for the plaintiff and assess his damages at $125,000.00, $125,000.00. E. R. Young, Foreman. March 24, 1958.

Gentlemen of the jury, is this your verdict?

A Juror: Yes, sir.

Note: The jury is now excused.

Jury out.

page 289 } Mr. Sands, Jr.: May it please the Court, counsel for the defendant moves the Court to set aside the verdict of the jury—

The Court: Do you want to take some time in preparing the exact language that you wish to make your motion in, and make it on a day convenient to opposing counsel and the Court, if you will permit my interrupting you?

Mr. Sands, Jr.: The grounds that we have I think are relatively simple.

The Court: Then go ahead, if you care to.

Mr. Sands, Jr.: We move the Court to set aside the verdict of the jury as being contrary to the law and the evidence, and upon the ground of misdirection of the jury by the Court. We move that the verdict be set aside upon the further ground that it is excessive, and that a new trial be awarded upon all issues.

The Court: The Court will continue the motion.

Mr. Allen: May it please Your Honor, I think we move that these gentlemen be required to file in writing specifically the grounds upon which they ask the verdict may be set aside.

page 290 The general grounds as he has made them are sufficient ordinarily, but when we come to meet the issue we want to know the specific grounds they are going to rely upon, and I think we are entitled to a written statement of their grounds filed in the Clerk's Office and within the rules.

The Court: First of all let me say I will continue the motion. The next step is the preparation of a transcript, and allowing counsel sufficient time to state with more particularity after they have had the transcript in their possession and filed with the Court, with some degree of particularity so that when plaintiffs begin to study their opposition to the motion they will know exactly where to begin.

I understand from Mr. Edwards that the transcript will be ready in about two weeks. Would counsel be able to file some amplification of their motion within two weeks after that?

Mr. Sands, Jr.: Yes, sir.

The Court: If you can, so I will order that you do that, and then I take it you will be in position for counsel to prepare their briefs, and opposition briefs, and we will set a date later on for argument.

* * * * *

A Copy—Teste:

H. G. TURNER, Clerk.

INDEX TO RECORD

	Page
Writ of Error and *Supersedeas* Awarded	1
Record	2
Interrogatories to Defendants	2
Answers to Interrogatories	3
Instructions	4
Judgment—December 3, 1958	19
Opinion	20
Plaintiff's Protest of Judgment	25
Notice of Appeal and Assignment of Error	25
Cross Assignment of Error	26
Witnesses:	
Dr. Charles E. Troland (Deposition)	28
Marvin A. Fellers	37, 165
Clinton S. Jones	42
Roger L. Jones	51, 70
Dr. R. D. Butterworth	59
Edward I. Gershowitz	79
Harold B. Boyd	82
L. L. Rustad	84
Garland P. Johnson, Sr.	86
Norris Robert Hodge	88
Mrs. Madeline R. Jones	92, 164
Dr. Jacob J. Hladys	97
Ralph H. Snyder	121
Dr. Virgil Robert May, Jr.	140
O. F. R. Bruce, Jr.	152
W. E. Bristol	159
Roger L. Jones	164
Proceedings	90, 113, 139, 169, 171
Verdict of the Jury	184

RULE 5:12—BRIEFS

§1. Form and Contents of Appellant's Brief. The opening brief of appellant shall contain:

(a) A subject index and table of citations with cases alphabetically arranged. The citation of Virginia cases shall be to the official Virginia Reports and, in addition, may refer to other reports containing such cases.

(b) A brief statement of the material proceedings in the lower court, the errors assigned and the questions involved in the appeal.

(c) A clear and concise statement of the facts, with references to the pages of the printed record when there is any possibility that the other side may question the statement. When the facts are in dispute the brief shall so state.

(d) With respect to each assignment of error relied on, the principles of law, the argument and the authorities shall be stated in one place and not scattered through the brief.

(e) The signature of at least one attorney practicing in this Court, and his address.

§2. Form and Contents of Appellee's Brief. The brief for the appellee shall contain:

(a) A subject index and table of citations with cases alphabetically arranged. Citations of Virginia cases must refer to the Virginia Reports and, in addition, may refer to other reports containing such cases.

(b) A statement of the case and of the points involved, if the appellee disagrees with the statement of appellant.

(c) A statement of the facts which are necessary to correct or amplify the statement in appellant's brief in so far as it is deemed erroneous or inadequate, with appropriate references to the pages of the record.

(d) Argument in support of the position of appellee.

The brief shall be signed by at least one attorney practicing in this Court, giving his address.

§3. Reply Brief. The reply brief (if any) of the appellant shall contain all the authorities relied on by him not referred to in his opening brief. In other respects it shall conform to the requirements for appellee's brief.

§4. Time of Filing. As soon as the estimated cost of printing the record is paid by the appellant, the clerk shall forthwith proceed to have printed a sufficient number of copies of record or the designated parts. Upon receipt of the printed copies or of the substituted copies allowed in lieu of printed copies under Rule 5:2, the clerk shall forthwith mark the filing date on each copy and transmit three copies of the printed record to each counsel of record, or notify each counsel of record of the filing date of the substituted copies.

(a) If the petition for appeal is adopted as the opening brief, the brief of the appellee shall be filed in the clerk's office within thirty-five days after the date the printed copies of the record, or the substituted copies allowed under Rule 5:2, are filed in the clerk's office. If the petition for appeal is not so adopted, the opening brief of the appellant shall be filed in the clerk's office within thirty-five days after the date printed copies of the record, or the substituted copies allowed under Rule 5:2, are filed in the clerk's office, and the brief of the appellee shall be filed in the clerk's office within thirty-five days after the opening brief of the appellant is filed in the clerk's office.

(b) Within fourteen days after the brief of the appellee is filed in the clerk's office, the appellant may file a reply brief in the clerk's office. The case will be called at a session of the Court commencing after the expiration of the fourteen days unless counsel agree that it be called at a session of the Court commencing at an earlier time; provided, however, that a criminal case may be called at the next session if the Commonwealth's brief is filed at least fourteen days prior to the calling of the case, in which event the reply brief for the appellant shall be filed not later than the day before the case is called. This paragraph does not extend the time allowed by paragraph (a) above for the filing of the appellant's brief.

(c) With the consent of the Chief Justice or the Court, counsel for opposing parties may file with the clerk a written stipulation changing the time for filing briefs in any case; provided, however, that all briefs must be filed not later than the day before such case is to be heard.

§5. Number of Copies. Twenty-five copies of each brief shall be filed with the clerk of the Court, and at least three copies mailed or delivered to opposing counsel 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.

§7. Effect of Noncompliance. If neither party has filed a brief in compliance with the requirements of this rule, the Court will not hear oral argument. If one party has but the other has not filed such a brief, the party in default will not be heard orally.

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