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# Record No. 5269

## In the Supreme Court of Appeals of Virginia at Richmond

## ERNEST EUGENE DAVIS

v.

## ELSIE LEE SYKES

FROM THE CIRCUIT COURT OF THE CITY OF PORTSMOUTH

### 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

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## Record No. 5269

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VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Friday the 25th day of November, 1960.

ERNEST EUGENE DAVIS, Plaintiff in Error,

*against*

ELSIE LEE SYKES, Defendant in Error.

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From the Circuit Court of the City of Portsmouth

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Upon the petition of Ernest Eugene Davis a writ of error and *supersedeas* is awarded him to a judgment rendered by the Circuit Court of the City of Portsmouth on the 27th day of May, 1960, in a certain motion for judgment then therein depending wherein Elsie Lee Sykes was plaintiff and the petitioner and others were defendants.

And it appearing from the certificate of the clerk of the said court that a suspending and *supersedeas* bond in the penalty of thirty-one thousand dollars, conditioned according to law, has heretofore been given in accordance with the provisions of sections 8-465 and 8-477 of the Code, no additional bond is required.

# RECORD

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* * * * *

In the Circuit Court of the City of Portsmouth, on the 3rd day of March, 1960.

At this day came the parties by their Attorneys, and thereupon came a jury, to-wit: Joseph V. O'Connor, William P. Collier, Derwood G. Askew, Lemuel C. Johnson, Jr., Walter J. Banks, Louis A. Raab, and Robert E. Elliott, who being duly sworn, the truth to speak, upon the issue joined, and upon the completion of plaintiff's evidence, the defendants, Shell Oil Company, and Hansford Burean Patterson, Jr., by counsel, in the absence of the jury, moved to strike the plaintiff's evidence as to them and that a summary judgment be entered in their favor; Whereupon, the Court granted the motion to strike plaintiff's evidence as to the defendants, Shell Oil Company and Hansford Burean Patterson, Jr., but did not act upon the motion for a summary judgment. The Court then advised the jury that there was no evidence before them upon which they might find a verdict against the defendants, Shell Oil Company and Hansford Burean Patterson, Jr., and submitted the case to the jury regarding said defendants, and the jury then retired to their room to consult of the verdict and after sometime returned into Court, having found the following verdict: "We the jury find the plaintiff has no claim against the Shell Oil Co. & Hansford Burean Patterson, Jr., Foreman, L. A. Raab,"; Whereupon the trial cou-
page 15 } tinued as to the defendant, Ernest Eugene Davis, and the jury having fully heard all the evidence and argument of counsel, retired to their room to consult of the verdict and after sometime returned into Court, having found the following verdict: "We the jury find a verdict for the plaintiff for the sum of 27,500.00, Jury Foreman, L. A. Raab."; Whereupon, the defendant, Ernest Eugene Davis, by counsel, moved the Court to set aside the verdict on the grounds that the said verdict is contrary to the law and evidence, and to enter judgment for the defendant, or in the alternative to grant a new trial, which motions are continued.

* * * * *

page 16 } INSTRUCTION NO. 1.

The Court instructs the jury that if you believe from the evidence that the defendant was guilty of gross negligence in driving his automobile while asleep, under the circumstances then existing, and that such gross negligence, if any, was the proximate cause of the accident and the injuries to plaintiff, then you must find a verdict in favor of the plaintiff, Elsie Lee Sykes.

Granted.

H. W. M.

page 17 } INSTRUCTION NO. 2.

The Court instructs the jury that the plaintiff, Elsie Lee Sykes, is not guilty of contributory negligence as a matter of law.

Granted.

H. W. M.

page 18 } INSTRUCTION NO. 3.

The Court instructs the jury that if you believe from the evidence that the defendant was guilty of gross negligence, and that this was the proximate cause of the accident, and the plaintiff was injured, then you must find a verdict in favor of the plaintiff.

Granted.

H. W. M.

page 19 } INSTRUCTION NO. 4.

The Court instructs the jury that if you find for the plaintiff, in fixing the amount of damages to be awarded to the plaintiff, you should award her such sum as you believe from the evidence to be fair, just and adequate, and in ascertaining such sum, you may take into consideration:

(a) Any bodily injury that she may have sustained by reason of the accident;

(b) Any physical and mental suffering that has been occasioned thereby;

(c) Any impairment of her physical condition;

(d) Any doctor, hospital and medical bills incurred as a result of the accident, and which will probably be incurred in the future as a result of the accident;

(e) Any loss of wages or earnings;

(f) The inconvenience and discomfort that was caused and will probably be caused hereafter from such injuries.

And you may fix her damages at such sum which is fair, just and adequate under the evidence not to exceed the amount claimed in the motion for judgment.

Granted.

H. W. M.

page 20 } INSTRUCTION NO. A.

The Court instructs the jury that since the plaintiff was a guest passenger in the defendant's automobile, the burden is upon the plaintiff to prove by the preponderance of the evidence that the defendant was guilty of gross negligence and that his gross negligence was the proximate cause of the accident.

If after hearing all the evidence you are in doubt whether the defendant was guilty of gross negligence which was the proximate cause of the accident and it appears equally as probable that he was not guilty as that he was, your verdict should be for the defendant.

Granted.

H. W. M.

page 21 } INSTRUCTION NO. C.

The Court instructs the jury that Virginia Courts have distinguished simple negligence from gross negligence; simple negligence has been defined as a lack or ordinary or reasonable care; gross negligence has been defined as wanton or willful disregard for human life or the property of others or that degree of negligence which shows an utter disregard

of prudence amounting to a complete neglect of the safety or rights of another as should shock fair minded men.

The Court further instructs the Jury that the plaintiff was a mere guest in the Davis automobile and it is the duty of the Jury to find a verdict for the defendant, Davis, unless you believe from a preponderance of the evidence that the accident was caused by the gross negligence of Davis.

Granted.

H. W. M.

page 22 } INSTRUCTION NO. I.

The Court instructs the Jury that you are the sole judges of the credibility of the evidence and witnesses and, when one or more witnesses testify positively to an alleged fact in conflict with the evidence of other witnesses, you may consider from the evidence the interest or motive of the witness in so testifying and you may weight the evidence and altogether disregard any testimony that you believe to be improbable or untrue.

Granted.

H. W. M.

page 23 } INSTRUCTION NO. J.

The Court instructs the Jury that you must consider this case solely upon the evidence before you and the law laid down in the instructions of the Court.

You must not let any sympathy you may feel influence your verdict. A verdict cannot be based in whole or in part upon conjecture, surmise or sympathy but must be based solely upon the evidence in the case and the instructions of the Court.

Granted.

H. W. M.

page 24 } INSTRUCTION NO. A-1.

The Court instructs the Jury that this case is based on gross negligence, and you cannot infer gross negligence of any kind on the part of the defendant from the mere happening of the

accident. The presumption is that the defendant was free from gross negligence and this presumption is an abiding one and applies at every stage of the trial.

Since the plaintiff was a guest passenger in the defendant's automobile, the burden is upon the plaintiff to prove by the preponderance of the evidence that the defendant was guilty of gross negligence and that his gross negligence was the proximate cause of the accident.

If after hearing all the evidence you are in doubt whether the defendant was guilty of gross negligence which was the proximate cause of the accident and it appears equally as probable that he was not guilty as that he was, your verdict should be for the defendant.

Refused.

H. W. M.

page 25 } INSTRUCTION NO. B.

The Court instructs the Jury that Davis was not an insurer against injury to the plaintiff; he was not required to exercise either a high degree of care or ordinary care but only owed to the plaintiff, a guest passenger, a duty not to wilfully or wantonly injure or show a complete disregard of her safety in the operation of his vehicle.

If you believe from the evidence that Davis did exercise the care required of him in the operation of his vehicle then you should find for the defendant. And this is true even if you believe that Davis did not exercise reasonable or ordinary care.

Refused.

H. W. M.

page 26 } INSTRUCTION NO. D.

The Court instructs the Jury that there is no evidence before you that the defendant at the time of the accident was intoxicated or that his ability to drive was impaired by the consumption of alcoholic beverages.

Refused.

H. W. M.

page 27 } INSTRUCTION NO. E.

The Court instructs the Jury that if you believe from the evidence in this case that there was a certain danger inherent to the journey from Portsmouth to Hobson, Virginia and back to Portsmouth in the light of the circumstances and conditions existing just prior to and at the time and place of the accident and that the plaintiff either knew and appreciated this danger or in the exercise of reasonable care should have known and appreciated this danger and that the plaintiff, not withstanding this danger, exposed herself to the danger and assumed the risk connected with being a passenger in the defendant's vehicle, then the plaintiff cannot recover and your verdict should be for the defendant. And this is true even though you may believe that the defendant was guilty of negligence.

Refused.

H. W. M.

page 28 } INSTRUCTION NO. F.

The Court instructs the Jury that if you believe from the evidence in this case that the plaintiff in the light of the circumstances and conditions surrounding the automobile journey just prior to and at the time and place of the accident was guilty of negligence which was the proximate cause of or contributed to the accident, then the plaintiff cannot recover and your verdict should be for the defendant. And this is true even if you believe that the defendant was guilty of negligence.

Refused.

H. W. M.

page 29 } INSTRUCTION NO. G.

The Court instructs the Jury that if you believe from the evidence that this accident was caused by the joint or concurring negligence of the plaintiff and the defendant, then your verdict should be for the defendant and this is true even if you believe that the defendant was more negligent than the plaintiff.

Refused.

H. W. M.

page 30 } INSTRUCTION NO. H.

The Court instructs the Jury that you are not to guess or speculate as to the gross negligence of the defendant. If you are unable to determine from a preponderance of the evidence before you whether or not the defendant was grossly negligent, then the plaintiff cannot recover and your verdict should be for the defendant.

Refused.

H. W. M.

page 31 }

* * * * *

May 26th, 1960.

John F. Rixey, Esq.
Attorney at Law
P. O. Box 3183
Norfolk, Virginia.

Herbert K. Bangel, Esq.
Attorney at Law
Law Building
Portsmouth, Virginia.

*Re*: Elsie Lee Sykes *v*. Ernest Eugene Davis, Circuit Court of the City of Portsmouth.

Gentlemen:

In view of the full argument and complete citation of authorities on the several points advanced for setting aside the verdict in this case, I think it no more than proper that the court should rule on each point involved and state its reasons for so doing.

The most important question of law presented by this record is whether, upon this testimony, the issue of gross negligence should have been left to the jury. Taking the testimony in the light most favorable to the plaintiff, as we

must in this case where the jury has found in her favor, we find that the defendant Davis after working all day at his regular job had gone to a party where he admits consuming three beers, and without sleep had driven the plaintiff and others to Hobson, Va. and about 5:30 A. M., while on the return trip, went to sleep and drove head on into a truck on the left side of the road, causing his guest, the plaintiff, to be injured. The plaintiff was likewise asleep, but the record is devoid of any evidence that the defendant's driving had been such as to alert her to any danger.

This case comes as nearly being on all fours with *Newell* v. *Riggins,* 197 Va. 490, as any personal injury case page 32 } is likely to become. There as here, the driver without previous warning of drowsiness late at night and after a dance where he had had two beers some hours earlier, went to sleep and ran off the road injuring his guest who was likewise asleep at the time of the impact. The court there observed that the fact that the operator of a motor vehicle permits himself to go to sleep while driving is sufficient to make out a *prima facie* case of want of due and proper care, and no matter what may be the cause of sleepiness, it is not probable that sleep would come to a driver of an automobile without some prior warning, which the jury would have the right to take into account in determining whether he was guilty of gross negligence. The disclosure of the defendant's activities for a period of twenty hours preceding the collision makes this case at least as strong as the Newell case, so far as presenting a jury question on gross negligence is concerned.

The next important exception by the defendant was the action of the court in withdrawing the question of concurring or contributory negligence from the jury in the form of its refusal to grant instructions E. F. & G, tendered by the defendant. No evidence was adduced which would support these instructions. The plaintiffs situation here was strikingly like that of the plaintiff in the Newell case which ruled that when the guest has had nothing to forewarn her that the driver was apt to go to sleep while driving or would be inattentive or careless about his duties, the fact that she was asleep bore no causal relation to the accident. The court is of opinion therefore that its ruling was correct in withdrawing the issue of contributory negligence or concurring neglegence from the jury.

The defendant complains of the action of the court in refusing to give the instruction tendered as A-1, and in itstead granting instruction A which contained the last two paragraphs of instruction A-1. The definition of gross negligence and burden of proof was amply convered in instruction A as

given and other instructions, and the combination of the first paragraph as offered with the remainder of the instruction might well have served to mislead the jury on the applicable law.

The defendant complains of the refusal to grant instruction D, which would have told the jury that there was
page 33 } no proof that the defendant was intoxicated or that his ability to drive was impaired by the consumption of alcoholic beverages. The defendant contends that this instruction should have been granted on the authority of four cases appearing in 191 Va. 471, 199 Va. 297, 199 Va., 817, and 200 Va. 127, all of which hold that the mere odor of alcohol on the breath of a person is not proof of intoxication. These cases do not hold that when proof of drinking does not measure up to the definition of intoxication that a defendant is thereby authorized to single out this fact as the subject of an affirmative instruction in his behalf. Moreover, in this case there was no affirmative proof that "his ability to drive was (not) impaired." The jury had the right to consider whether his consumption of beer might have contributed to his drowsiness even though he were not intoxicated.

Objection was made to the ruling of the court in permitting Mr. & Mrs. Cecil Jones to testify as to the plaintiff's reputation for truth and veracity. At the time this testimony was received the defendant had been called as an adverse witness and had testified contrary to the plaintiff with respect to the sequence of events leading up to the return trip from Hobson when the collision occurred. With the jury thus confronted with the choice of believing either the plaintiff or the defendant, not only upon those details in which their narratives differed, but also their testimony as a whole, it was proper to receive evidence of the plaintiff's reputation for truth and veracity. Even if this had been properly reserved for rebuttal the evidence could have had little effect on the outcome of the case.

The defendant also excepted to the action of the court in refusing to inquire of the panel on the *voir dire* examination whether any of them knew or had done business with Mr. & Mrs. Cecil Jones the employers of the plaintiff. The court adheres to its ruling from the bench that questions to jurors concerning acquaintance with or doing business with employers of the plaintiff who were merely character witnesses in the case is beyond the scope of reasonable *voir dire* examination.

The defendants motion to set aside the verdict on the ground that it was excessive was not pressed.
page 34 } The court finds no error committed in the trial of this case which would warrant setting aside the

verdict of the jury, and consequently judgment will be entered on the verdict. If a stay of execution is desired within 24 hours so that proper provision can be included in the order and the bond will be set at $31,000.00.

Very truly yours,

H. W. MacKENZIE, JR.

HWM;jr/lb

page 35 }

* * * * * *

In the Circuit Court of the City of Portsmouth, on the 27th day of May, 1960.

At this day came again the parties by their Attorneys and the Court having fully heard the motion of the defendant, Ernest Eugene Davis, by counsel, to set aside the verdict of the jury, heretofore rendered herein, on the grounds that the said verdict is contrary to the law and evidence, and to enter judgment for the defendant, or in the alternative to grant a new trial, doth overrule the same, to which action of the Court, the defendant, by counsel, excepted; it is therefore considered by the Court that the plaintiff recover of the defendant, the sum of Twenty-seven Thousand, Five Hundred Dollars ($27,500.00) with interest thereon to be computed at the rate of six per cent per annum from the 4th day of March, 1960, till paid, and her cost by her about her suit in this behalf expended.

And the said defendant in Mercy &c.

But at the instance of the defendant, who desires to present a petition for a writ of error and *supersedeas* to the judgment entered in this case, execution hereof is suspended for a period of Sixty (60) days from the date of judgment, when the said defendant or someone for him, shall give bond before the Clerk of this Court, with surety approved by said Clerk, in the penalty of Thirty-one Thousand Dollars ($31,000.00), payable to the plaintiff in this case, with a condition re-
page 36 } citing said judgment and the intention of the said defendant to present such petition and providing for the payment of all such damages as any person may sustain by reason of such suspension in case a *supersedeas* to such judgment should not be allowed and be effectual within the time above specified.

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page 37 }

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## ASSIGNMENTS OF ERROR.

Pursuant to the above mentioned Rules, the defendant assigns the following errors:

1. The Court erred in refusing to strike the evidence of the plaintiff at the conclusion of the plaintiff's case on the grounds of no gross negligence shown as a matter of law.
2. The Court erred in refusing to strike the evidence of the plaintiff for the aforesaid reason at the conclusion of all the evidence.
3. The Court erred in refusing to examine properly the jury on the *voir dire*.

page 38 } 4. The Court erred in granting Instruction No. 2.

5. The Court erred in granting Instructions No. 3 and No. 1.
6. The Court erred in refusing to grant Instruction A-1.
7. The Court erred in refusing to grant Instruction No. B.
8. The Court erred in refusing to grant Instruction No. D.
9. The Court erred in refusing to grant Instruction No. E.
10. The Court erred in refusing to grant Instruction No. F.
11. The Court erred in refusing to grant Instruction No. G.
12. The Court erred in refusing to grant Instruction No. H.
13. The Court erred in admitting character evidence for the plaintiff from witnesses Margaret Jones and Cecil Jones.
14. The Court erred in admitting certain evidence from witness Dr. Byron T. Eberly as to the probable future medical expenses of the plaintiff.
15. The Court erred in refusing to set aside the verdict and enter final judgment for the defendant.
16. The Court erred in refusing to set aside the verdict and award the defendant a new trial.

ERNEST EUGENE DAVIS

By .....

Of Counsel.

* * * * *

page 3 }

* * * * *

The Court: Gentlemen of the jury, this case this morning is an action brought by Elsie Lee Sykes against Ernest Eugene Davis, 2657 Glasgow Street, the Shell Oil Company and Hansford Burean Patterson, Jr., of 4910 Shafer Street, in Norfolk, on a claim of injury arising from an automobile accident that occurred at or near the intersection of Route 17 and Riverside Drive or on the Churchland Bridge, in that area, on November 21, 1959. According to the papers here, it appears that Elsie Lee Sykes was a passenger in a car driven by Ernest Eugene Davis which was in collision with a truck of the Shell Oil Company driven by Hansford Burean Patterson, Jr., on the 21st of November 1959. Are any of you related by blood or marriage to either Elsie Lee Sykes or Ernest Eugene Davis, or Hansford Burean Patterson, Jr.? Are any of you employees or stockholders or in any other way connected with the Shell Oil Company? Do any of you know anything about this accident? Have you expressed or formed any opinion with respect to the liability? Are you sensible of any bias or prejudice for or against any of these parties that are involved? Do you know of any other reason that you couldn't render a fair verdict on the evidence as

page 4 } it comes out here on the witness stand?

Mr. Rixey: If your Honor please, I would like to request the Court to inquire of the panel whether or not any of them either know or are acquainted with or have done any business with either the plaintiff in this case, who is Elsie Lee Sykes, or her attorneys, Mr. Herbert Bangel and Mr. Leon, of the firm of Bangel, Bangel & Bangel, or Elsie Sykes' employers, Mr. and Mrs. Cecil Jones in Portsmouth. I think it is a matter as far as the defendants are concerned upon which they are entitled to have information; not that it would be information that would lead to automatic elimination of any juror but, certainly, information which is relevant to the defense of the case.

The Court: I can't agree with you so far as the matter of knowledge of the employers of the plaintiff, but I think it is proper to know whether any member of the panel is now or has been represented by the firm of Bangel, Bangel & Bangel or the firm of Rixey & Rixey or the firm of Seawell, McCoy, Winston & Dalton. Have any of you gentlemen been represented by or are you now represented by any of these law firms that are involved?

*Officer J. E. Coner.*

Mr. Rixey: If Your Honor please, my under-
page 5 } standing is that Mr. and Mrs. Jones, the employers of the plaintiff, are called to appear here as witnesses today and I think it is important to know whether or not the members of the panel are acquainted with or have done business with those people who expect to appear here as witnesses. Now, I don't single the Joneses out. The same would be true of any of the witnesses; but as far as my motion is concerned, I am particularly concerned with the Joneses.

Mr. Bangel: If Your Honor please—

The Court: I think we have got to call a limit on things at some place and I don't believe that the Court is called on to propound a question to the jurors as to whether any of them know or have done business with any of the witnesses who might be called on to testify in the case. I can't see the connection. I will overrule your motion on that.

Mr. Rixey: I note an exception, please.

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page 7 }

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OFFICER J. E. CONER,

called as a witness on behalf of the plaintiff, and having been first duly sworn, testified as follows:

Examined by Mr. Bangel:

Q. State your name, please, sir.

A. James E. Coner.

Q. Mr. Coner, I believe you are an officer of the Norfolk County Police Department?

A. That is correct.

Q. Were you such on November 21 of last year?
page 8 } A. I was.

Q. In your official capacity as a police officer, were you called to the scene of an automobile-truck collision which occurred on the Churchland Bridge?

A. I was.

Q. On that date. Did you go there to investigate the—

A. Yes, I did.

Q. —collision. Upon your arrival, how many vehicles did you find that were involved in this collision?

A. I found two; two vehicles involved.

*Officer J. E. Coner.*

Q. What type of vehicles were they?
A. We had a tractor-trailer, a '57 tractor-trailer.
Q. And did you ascertain—
A. (Continuing) And a Pontiac sedan. The tractor-trailer belonged to Shell Oil Company, 200 East Chapel Road.
Q. And the Pontiac sedan was being driven by whom?
A. The Pontiac sedan was being driven by Ernest Eugene Davis.
Q. Officer, what were the weather conditions at the time?
A. It was on a hill crest, blacktop road. Surface conditions were dry; no defects in the road. It was darkness with street lights. The weather was clear. And it is considered
page 9 } a residential district.
Q. How was visibility?
A. The visibility was good.
Q. You say the street was lighted?
A. The street was—the bridge was lighted, that is right.
Q. Is that bridge well lighted?
A. Yes, it is well lighted.

(Mr. Bangel showed some pictures to opposing counsel.)

By Mr. Bangel:
Q. Officer, I hand you first one photograph and ask you if that portrays the condition of these two vehicles upon your arrival at the scene of this collision?
A. That is correct.

Mr. Bangel: I offer this into evidence if Your Honor please; I ask that it be marked Plaintiff's Exhibit 1.

(The picture referred to was marked Plaintiff's Exhibit 1.)

By Mr. Bangel:
Q. And I hand you a second photograph and ask you if that is a photograph of the Pontiac automobile which was involved in this collision?
A. That is correct, that is the car.
page 10 } Q. And I believe, as the photograph shows and as counsel mentioned over at the counsel table, this was after the car had been pulled back away and disengaged from the—
A. That is the truck. The car was pulled back away from the truck. The truck was still in the same spot.

*Officer J. E. Coner.*

Q. This photograph does show the damage and condition of the Pontiac?
A. That is right.

Mr. Bangel: We offer this into evidence.
The Court: Plaintiff's Exhibit 2.

(The photograph referred to was marked Plaintiff's Exhibit 2.)

By Mr. Bangel:
Q. Officer, I will ask you to step down here if you will. I ask you, sir, if you will point out to the jury or state to the jury what these items are that I am pointing to here.
A. Those are your lights around the bridge itself.
Q. Is this the light pole?
A. That is right; stationed all along the bridge there at equal distances.
Q. And, Officer, I ask you in what direction is this photograph looking? In what direction are the jury looking as they look at this picture; which would be the direction, I take it, from which the truck was coming?
page 11 } A. That is heading towards Portsmouth, which would be close to east.
Q. East?
A. That is right.
Q. Then they would be looking east?
A. That is right, looking towards the city, coming from Churchland. That is right.
Q. What is this line here, Officer?
A. That is a solid line.
Q. What does that indicate?
A. No-pass line. It is a downhill crest there. It is over the center of the bridge.
Q. Officer, during the course of your tour with the Norfolk County Police Department in police work, have you had an opportunity to investigate many accidents?
A. Many of them.
Q. And could you tell us, sir, in your opinion, what speed the automobile was proceeding, from the physical damage that you found when you arrived there at the scene?

Mr. Rixey: Excuse me just a minute. I object to the question, Your Honor. It calls for an expression of opinion on the part of this officer which he can't give.

*Officer J. E. Coner.*

The Court: I will sustain the objection.
Mr. Bangel: All right, sir. We save the point.

page 12 } (Handing exhibits to the jury) Pass those down, sir.

By Mr. Bangel:
Q. Officer, during the course of your investigation did you have occasion to question Ernest Eugene Davis, the driver of the Pontiac automobile?
A. No. He was in a dazed condition, couldn't question him. But we asked him what had happened and he told me that he had fell asleep—Officer Lakowski and myself—had fell asleep at the wheel.
Q. And he made that statement to you there at the scene?
A. He made that statement, that is right.
Q. Officer, did your investigation reveal any skid marks behind either vehicle?
A. No. There was no skid marks.
Q. Was Elsie Sykes removed from the scene of the collision?
A. She was sitting on the curb just aft of the car Mr. Davis was driving, and the Western Branch ambulance—I called Western Branch ambulance and they come up and took her to the hospital.
Q. She had received injuries in this accident?
A. Oh, yes. She was hurt badly.

page 13 } CROSS EXAMINATION.

By Mr. Rixey:
Q. Mr.—Coner, is that correct?
A. That is right.
Q. The accident happened west of the crest of the bridge, did it not, sir?
A. That is right; Churchland downhill side.
Q. And for the purpose of some of us who don't know, could you tell us about how long the bridge is itself?
A. No, I couldn't tell you the length of the bridge.
Q. How many lanes wide is that bridge?
A. It is about two and a half. It is only supposed to be a double lane.
Q. It is only marked for two lanes of traffic?
A. That is right.

*Officer J. E. Coner.*

Q. That is, one lane of traffic heading east and one lane of traffic heading west?

A. That is right.

Q. Would you say that those two lanes were approximately ten to 12 feet wide?

A. Well, they are average sized lane; maybe a little bigger than average size. A little walk alongside there.

Q. Is there a sidewalk along—

A. No, there is not a sidewalk; not considered a sidewalk, just a small—

page 14 } Q. Any place to walk along, to walk over the bridge?

A. I imagine you could but it would be a tight squeeze. We have a large cable or pipe running alongside.

Mr. Bangel: It is shown in those photographs.

Mr. Rixey: I understand.

By Mr. Rixey:

Q. Is there a sidewalk on each side of the bridge or just one side, if you recall?

A. I couldn't recall.

Q. I show you photograph marked Plaintiff's Exhibit 1 and ask you if that would indicate to you. I am just trying to get it in the record whether or not there is a sidewalk on each side of the bridge.

A. Well, you might call it a sidewalk. It is just—if it is, it is a right narrow one, a catwalk.

Q. You say that the weather was clear?

A. Yes.

Q. And visibility was good?

A. That is right, visibility was good.

Q. Can you tell us, Mr. Coner, how far down from the crest of the bridge the accident happened? Did you pace it off by any chance?

A. No, I didn't pace it off but it was definitely on a downgrade. The truck had passed over the crest.

Q. The truck was going downgrade?

page 15 } A. That is right and passed over—

Q. The automobile—

A. —was passing up.

Q. —still going upgrade?

A. That is right, and he had a solid line on the down—

Q. Did you pace off the distance from where the impact

occurred to the western end of the bridge; that is, down the bridge?

A. No, we didn't pace it off. The traffic was solid and we had the City, the City of Portsmouth Police Department and also the State was assisting us, and traffic was heavy time; it was 6 o'clock in the morning.

Q. It was during the darkness, was it not?

A. It was dark.

Q. What time did you arrive at the scene?

A. We were notified at 5:50, got there about 5:55.

Q. Have you been able to ascertain approximately the time of the accident?

A. Well, it was before 5:50; exactly, I don't know.

Q. You say you found no skid marks from either vehicle?

A. No, there was no skid mark whatsoever.

Q. Did you find any markings on the bridge prior to the impact that would indicate the path of the vehicles before the actual crash?

page 16 } A. No. There was no markings. They looked like just a straight line come right across the line with a sweep headed right on down through there. If the truck hadn't been there, he would have went off the bridge.

Q. You found nothing behind the automobile to indicate how long he had been on the wrong side of the road, did you?

A. No.

Q. This statement you have just made that the car would have run off the bridge, that is your opinion?

A. That is my opinion, that is right.

Mr. Rixey: Your Honor, I would ask to strike the opinion as to the car going off the bridge had the truck not been there.

The Court: I think that is the witness's conclusion. The jury will limit their consideration to the facts.

Mr. Rixey: Yes, sir. Thank you, Mr. Coner; I appreciate it.

By Mr. Winston:

Q. Mr. Coner, I will be very brief with you, sir. The two vehicles at the time that you got to the scene were entirely over in the lane of traffic which is used by vehicles coming from Portsmouth towards Churchland?

A. That is right.

*Officer J. E. Coner.*

Q. No portion of either vehicle was over the
page 17 } white line that marks the center of the bridge?
A. No. They were definitely over in the other lane, both of them.
Q. As a matter of fact, the automobile was right flush up against this so-called sidewalk that we have been talking about?
A. That is right.
Q. Jammed up against—
A. Jammed against the right fender of the truck.
Q. The vehicles had not been moved?
A. No, they had not been moved when I arrived.
Q. I will show you two additional photographs, the first of which is this one, sir, and I ask you if that is another view of the two vehicles as they rested at the time that you got to the scene of the accident?
A. That is correct.
Q. And will you tell us toward which direction that photograph is taken?
A. This is taken towards Churchland.
Q. Towards Churchland?
A. That is correct.

Mr. Winston: We will ask this, Your Honor, to be marked as Defendants Shell-Patterson exhibit.
The Court: We will call this D 2-1.

(The photograph referred to was marked D 2-1
page 18 } for the defendants Shell-Patterson.)

By Mr. Winston:
Q. I will show you one other photograph and ask you if that is a picture of the Shell Oil truck showing the damaged portion of the truck?
A. That is right; after the car was pulled back. Yes.
Q. Does it show the truck in the position that it rested before it was moved following the collision?
A. The truck is sitting in the same spot as it was when I arrived there, except the car had been pulled away.

Mr. Winston: We offer this, Your Honor, as Defendants Shell-Patterson exhibit.
The Court: This will be D 2-2.

(The photograph referred to was marked D 2-2 for the defendants Shell-Patterson.)

Mr. Winston: That is all, sir.

By Mr. Rixey:

Q. May I ask just a question or two more? Mr. Coner, was Elsie sitting on the curb when you got there?

A. That is right; behind the car.

Q. Did you talk with her?

A. No. She was in no talking condition.

Q. Did you subsequently talk with her—

A. No.

page 19 } Q. —later on?

A. No, I didn't.

Q. You never have talked—

A. No, I never have talked to her yet.

Q. You—

A. No, she couldn't even talk in the hospital. I seen her in the hospital laying on the table.

Mr. Rixey: That is all.

RE-DIRECT EXAMINATION.

By Mr. Bangel:

Q. You say she couldn't talk. You mean she was in no condition to talk?

A. She was in very bad shape. She couldn't do no talking. The nurse said not to question her.

Mr. Bangel: That is all.

* * * * *

page 20 } Mr. Bangel: If Your Honor please, we would like to call the defendant as an adverse witness.

HANSFORD BUREAN PATTERSON, JR.,
a defendant, called by the plaintiff as an adverse witness, and having been first duly sworn, testified as follows:

Examined by Mr. Bangel:

Q. Your name is Hansford Burean Patterson, Jr.?

A. That is right; you pronounce it Burean.

*Hansford Burean Patterson, Jr.*

Q. How do you spell that?
A. (Witness spelling Burean).
Q. And were you driving the oil truck that was owned by Shell Oil Company and which was involved in this collision?
A. Yes, sir.
Q. Where had you been, sir? Where were you coming from?
A. Well, I was coming from South Norfolk.
Q. Going in what direction?
A. Going towards Newport News. I was going out of Portsmouth to Churchland and then on to Newport News.
Q. I believe this collision occurred on the Churchland Bridge?
A. Yes, sir.
Q. How fast were you going as you approached
page 21 } the bridge?
A. I would say at the foot of the bridge maybe 35; 30, 35, approximately.
Q. As you went across the bridge what speed were you going?
A. Approximately 15 as I reached the top.
Q. Where were you when you saw this Pontiac automobile for the first time?
A. Just as I was coming to the crest of the hill, the truck sits high and I could see the car and it was in his own lane, I will say, in the left side of the road as he was coming towards me. And then all of a sudden—
Q. Wait a minute. Where was the car then?
A. Oh, he was a pretty good ways down the bridge. I couldn't say how far.
Q. All right, sir. Suppose you tell me what happened.
A. And then after I saw him on his side of the road, all of a sudden he just came over on my side and stayed there; didn't try to go back at all or anything, just stayed right there.
Q. How far was he from you at that time?
A. Well, I don't want to be guessing but when I first—when he first started over, I would say maybe five, six hundred feet, maybe even further.
Q. You say you were proceeding you estimate at a speed of 15 miles per hour?
page 22 } A. As I reached the top.
Q. And that was the speed you were going then?
A. That is right.

Mr. Bangel: You may inquire, sir.

*Hansford Burean Patterson, Jr.*

CROSS EXAMINATION.

By Mr. Rixey:

Q. Mr. Patterson, when you first saw the Pontiac automobile driven by Davis, was it on the bridge?

A. Yes, it was.

Q. Just so that we can understand, would you estimate its position with reference to the top of the bridge and the western end of the bridge? Was it halfway up or a quarter of the way up?

A. I would say it was at least halfway up.

Q. When you first saw it?

A. That is right.

Q. It was one half—

A. Approximately one-half way—

Q. —up the bridge?

A. That is right.

Q. And you at that time were just coming over the crest?

A. Just coming through the crest. I could see,
page 23 } you see, over before I got to the top.

Q. Because you were sitting high in your truck?

A. That is right.

Q. How far did your truck go after that before the collision?

A. Well, it would be hard to say. I would say anywhere from a hundred to maybe two hundred feet, something like that.

Q. One hundred feet to two hundred feet before the accident?

A. That is right.

Q. And was your truck stopped or was it moving at the time of the accident?

A. It was either stopped or just barely moving. I couldn't say absolutely that it was stopped but it was just barely moving or stopped.

Q. Did the automobile bounce backwards at the collision or did your truck bounce backwards or did they both just collide, remain like that?

A. They just came together and just stayed there.

Q. Like that. And do I understand that you estimate that the car was about five hundred feet to six hundred feet away from you when you first saw it coming over into your lane?

A. I would say, approximately.

page 24 } Q. Did you immediately put on your brakes—

A. Yes, I did.

Q. —and sound your horn?
A. Yes, I did.
Q. Did the automobile have its headlights on?
A. Yes, he had his headlights on.
Q. And you had your headlights on?
A. That is right.
Q. Would you estimate for us the time as best you can of the accident?
A. You mean from the time I saw him?
Q. No; the time the accident happened.
A. I would say a quarter to 6:00.
Q. You would say around 5:45 in the morning?
A. I say that.
Q. November 21st?
A. Yes.

Mr. Rixey: Thank you, Mr. Patterson.
Mr. Winston: Your Honor, I will not question him at this time; reserving the right to put Mr. Patterson back later if I choose to do so, sir.
The Court: All right.
Mr. Bangel: If Your Honor please, one other question.

page 25 } RE-DIRECT EXAMINATION.

By Mr. Bangel:
Q. Going at 15 miles per hour, what distance does it take you to stop your truck?
A. I—I couldn't answer that.
Q. You have no idea?
A. It doesn't—it doesn't take very far, though.
Q. It doesn't?
A. No.
Q. Doesn't take very far to stop going 15 miles an hour?
A. No.
Q. Could you give us some estimate?
A. I just couldn't say for sure.
Q. How long had you been driving this truck?
A. I would say six years.
Q. And you can give us no idea as to what distance it would take you to stop going at 15 miles an hour?
A. I would have to guess. But I would say maybe I—I just wouldn't want to say because I am not sure.
Q. Then I take it you were driving not sure of what distance you could stop your truck in, is that right?

*Hansford Burean Patterson, Jr.*

A. No, that is not right.

Q. Well, could you give us some idea?

page 26 } A. Well, I would say if I was doing 15 miles an hour I could stop maybe in 50 or maybe 100 feet.

Q. It would take you 50 to 100 feet to stop?

A. Roughly. I am just guessing.

Q. And you say when you saw this car some five or six hundred feet ahead of you, you were in your lane of travel?

A. That is right.

Q. In the proper lane on the right-hand side going towards Churchland?

A. That is right.

Q. When you saw it over in your lane, you say you applied your brakes?

A. That is right.

Q. And that is all you did?

A. And blew my horn.

Q. You blew your horn?

A. Yes, I did.

Q. You blew it nice and loud, didn't you?

A. I kept on blowing it.

Q. Even though you blew your horn and gave signal, did the car change its course?

A. It never changed at all. I kept expecting it to but it never did.

Q. It came right toward you—

page 27 } A. That is right.

Q. —and struck you. That is all, sir.

RE-CROSS EXAMINATION.

By Mr. Rixey:

Q. Mr. Patterson, before the impact could you see at all into the front seat of the automobile?

A. I would say if I was looking I could see, but I didn't see anything because I was so excited and all. I didn't—I just didn't see anything.

Mr. Rixey: That is all.

Mr. Bangel: Ernest Eugene Davis. If Your Honor please, I would like to call him as an adverse witness.

The Court: Suppose we take about a five-minute recess.

(During the recess the following occurred in the Judge's chambers, in the absence of the jury:)

Mr. Rixey: Your Honor, I just want to state for the record that just a moment ago when I went out into the hall to get a drink of water, I nodded and spoke to Mr. and
page 28 } Mrs. Jones; I assume that is who they are. They are people who stood up and were sworn. I think it was Mr. Jones who spoke to Mr. Bangel. And while there, after I got my drink of water I turned to come back; one of the jurors stopped to have a conversation, a short conversation with Mr. Jones and maybe Mrs. Jones, too, I don't know. I am not suggesting that there is anything improper about the conversation that they had because I am satisfied they didn't either have the time or the inclination to discuss the case. But I did overhear this juror say—and he is the elderly gentleman on the jury in the brown suit and he is sitting about the third seat in from over on the side that Mr. Winston and I are.

Mr. Bangel: When was this?

Mr. Rixey: This was right in the front door coming from the hall into the courtroom. And I heard this juror say to Mr. Jones or to Mr. and Mrs. Jones, that it was very nice seeing them, or something to that effect. I just want to put this in the record in view of my previous motion to examine the panel, to show that obviously this juror does know the Joneses, is acquainted with them. I don't know what the other connections are. In view of the fact that I have taken exception to Your Honor's previous ruling, I am adding this in the record at this time. I again emphasize that I
page 29 } don't suggest that there was anything at all improper about the juror's conversation with the Joneses. Certainly, the conversation itself would not indicate any bias or prejudice or interference with the jury.

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page 30 }

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ERNEST EUGENE DAVIS,

a defendant, called by the plaintiff as an adverse witness, and having been first duly sworn, testified as follows:

*Ernest Eugene Davis.*

Examined by Mr. Bangel:

Q. State your name?

A. Ernest Eugene Davis.

Q. Were you operating the Pontiac automobile
page 31 } that was involved in this collision?

A. Yes, I was.

Q. On November 21st of last year?

A. Yes, I was.

Q. Elsie Sykes was riding in the car with you as a passenger?

A. Yes.

Q. Was there anyone else in the car?

A. No, there wasn't.

Q. And from where were you coming and where were you going?

A. You mean where was I coming from?

Q. Yes.

A. I was coming from Hobson, Virginia.

Q. That would be in the direction of Churchland from here, is that right?

A. Yes, sir.

Q. Coming from that direction?

A. Yes, sir.

Q. Coming towards Portsmouth?

A. That is right.

Q. This collision occurred on the Churchland Bridge, is that right?

A. Yes, sir.

Q. In what lane did the collision occur?
page 32 } A. In the left-hand lane.

Q. Left-hand lane the direction you were going? In the direction that you were going, in the left-hand lane?

A. That is right, sir.

Q. Would that be for the traffic going towards Portsmouth or coming toward Churchland?

A. Coming towards Portsmouth.

Q. The collision occurred in that lane which was coming toward Portsmouth or going from?

A. Going from Portsmouth.

Q. And your car went over into that other lane?

A. Yes, sir.

Q. Hit this truck head on?

A. Yes, sir.

Q. When did you first see the truck?

A. I never did see it.

*Ernest Eugene Davis.*

Q. You went to sleep?
A. I fell off.
Q. What?
A. I dozed off to sleep.
Q. And that is what caused this accident?
A. Yes, sir.
Q. Where do you work?
A. Planters Manufacturing.
Q. What time did you go to work that day?
page 33 } A. 10:00 o'clock.
Q. Night or morning?
A. Morning.
Q. What time did you get off?
A. 9:00.
Q. That night?
A. That is right, sir.
Q. Did you get any sleep from the time you went to work at 10:00 o'clock that morning, until around 5:30 when this collision occurred?
A. Yes, I did.
Q. Where?
A. At home.
Q. When?
A. On Saturday—I mean Friday night.
Q. What time did you go to sleep?
A. Let's see. Around about 12:30, something like it.
Q. What time did you get up?
A. Around about 2:30.
Q. Where did you sleep?
A. At home.
Q. Whom do you live with?
A. My mother.
Q. What is her name?
page 34 } A. Lizette Humphrey.
Q. Liz?
A. Lizette.
Q. Liz —
A. —Humphrey.

Mr. Rixey: Lizette (spelling it), I think.

By Mr. Bangel:
Q. Lizette Humphrey?
A. That is right, sir.
Q. And was she home when you went to sleep?

*Ernest Eugene Davis.*

A. Yes, she was home.
Q. And then you fell asleep again while driving this car?
A. That is right, sir.
Q. And went over on the left-hand side of the road?
A. Yes, sir.
Q. How fast were you going?
A. I mean I couldn't say. When I fell out, I mean dozed off to sleep, I couldn't say how fast I was going.
Q. When is the first time you dozed off?
A. When the first time? I didn't do it but once.
Q. How fast were you going at that time?
A. Oh, before this?
Q. Yes.
A. I will say around about 35.
page 35 } Q. Running about 35 miles per hour?
A. That is right, sir.
Q. You state that is how fast you were going when this collision occurred?
A. Oh, I couldn't say how fast I was going when it occurred.
Q. Do you remember going on the Churchland Bridge?
A. Yes, I do.
Q. You remember that?
A. Yes, sir.
Q. There is a center white line down the Churchland Bridge, isn't it?
A. Yes, sir.
Q. Is it a solid line or broken line?
A. It is solid.
Q. Solid?
A. Yes, sir.
Q. What does that mean?
A. No passing.
Q. Did you cross over that line?
A. I mean I have to when I dozed off to sleep.
Q. You had to when you dozed off to sleep?
A. (The witness nodded).
Q. That is all.

Mr. Winston: No questions.

page 36 } CROSS EXAMINATION.

By Mr. Rixey:
Q. Ernest, do you remember before the accident, being on the Churchland Bridge?

*Ernest Eugene Davis.*

A. Yes, sir, I do.
Q. Did you ever see the truck before the accident?
A. No, sir.
Q. Will you tell the jury, please, approximately where you were on the bridge the last time you remember?
A. I was just about halfway up.
Q. Just about halfway up the bridge—
A. Yes, sir.
Q. —the last time you remember?
A. That is right.
Q. Were the lights working on your car?
A. Yes, sir.
Q. Will you state whether or not the car was in good mechanical condition as far as you know?
A. As far as I know, it was running.
Q. Running all right?
A. Yes, sir.
Q. Was the visibility good?
A. What is that now?
Q. Could you see all right up ahead of you?
A. Oh, yes, sir.
page 37 } Q. Were there any other cars going the same way you were going in, right up ahead of you?
A. No, sir.
Q. Were there any cars going the same way you were going, behind you?
A. No, sir.
Q. What was Elsie Sykes doing when you came to the Churchland Bridge?
A. She was asleep.
Q. She was asleep in the car?
A. Yes, sir.
Q. How long had she been asleep in the car?
A. It wasn't long after I left out of Hobson.

Mr. Rixey: Can you (addressing jury) hear him over there?

By Mr. Rixey:
Q. You say it wasn't long after you left out of Hobson?
A. Yes, sir.
Q. Will you tell the jury, please, approximately how long Elsie had been asleep?
A. What do you mean? Before the—

*Ernest Eugene Davis.*

Q. Before the accident, yes; excuse me. In time, if you know.

A. I would say round about 20 minutes or 15
page 38 } minutes, something like that.

Q. 15 to 20 minutes?

A. A-hum.

Q. Did you and Elsie talk at all or have any conversation at all after you left Hobson to come back to Portsmouth?

A. No, sir.

Q. Where was she seated in the automobile?

A. In the front.

Q. Whereabouts in the front seat was she?

A. I mean she was on the right-hand side with her head faced this way, laying on it.

Q. Her head was facing to her right?

A. Yes, sir.

Q. That would be over toward the door?

A. That is right.

Q. Is that right?

A. Yes, sir.

Q. How long have you known Elsie Sykes?

A. I say about a year and a half.

Q. On Friday night, the 20th of November, what time did you get home? That would be the night before the accident happened in the morning. What time did you get home?

A. I will say round about 10:30 or 11:00 o'clock.
page 39 } Q. And after you got home, what did you do?

A. I ate and looked at T. V.

Q. You ate and you looked at T. V.?

A. A-hum.

Q. Was there anything particular on T. V. that you were looking at?

A. Yes. I mean story; I mean just like look at T. V.

Q. Was it a play? A movie, or what?

A. It was a movie.

Q. A late movie?

A. Yes.

Q. Did you watch the whole movie?

A. Yes, I watched it.

Q. After the movie was over, what did you do?

A. I went up to bed.

Q. Went up to bed and that was about what time?

A. Around 12:30 or a quarter to 1:00, something like it.

Q. What time did you wake up?

A. Around 2:30 or something to 3:00.

*Ernest Eugene Davis.*

Q. And what woke you up?
A. My friend wanted me to take him home.
Q. Say that—
A. One of my friends wanted me to take him
page 40 } home.
Q. One of your friends wanted you to take him home?
A. Yes.
Q. Where was his home?
A. In Hobson, Virginia.
Q. And how did this friend wake you up?
A. By knocking on the door.
Q. You heard him knock on the door?
A. Yes.
Q. Did you know before then that he was going to come ask you to take him home?
A. No, I didn't.
Q. What is that friend's name?
A. Walker.
Q. Walker?
A. That is right.
Q. What is his first name? Do you know?
A. No, I don't.
Q. What do you call him?
A. Wink.
Q. Wink Walker?
A. That is right.
Q. Is that right?
A. That is right.
Q. Did you agree to take Wink Walker home?
A. That is right.
page 41 } Q. And he lived at Hobson, Virginia?
A. That is right.
Q. Had you ever been there before?
A. I have been there several times.
Q. Then did you get dressed and go out and start taking him home?
A. I just put on my regular clothes, just put on the clothes I work in, that is all.
Q. You just put on your regular working clothes?
A. Yes.
Q. And went downstairs, is that right?
A. That is right.
Q. Did he get in the car with you?
A. Yes, sir.

*Ernest Eugene Davis.*

Q. And after Wink Walker got in the car with you, where did you go?
A. By Elsie Sykes' house.
Q. By Elsie Sykes' house?
A. Yes.
Q. For what reason did you go by Elsie Sykes' house?
A. Because I mean he wanted to go by there.
Q. Who wanted to go? Walker?
A. Yes.
Q. Did you want to go by there, or Walker?
A. I mean I was taking him.
page 42 } Q. You just agreed to go by there, is that right?
A. That is right.
Q. All right. Did you go inside Elsie Sykes' house?
A. No, I didn't.
Q. Did Wink Walker go inside Elsie Sykes' house?
A. Yes, sir.
Q. And how long did he stay in there?
A. He didn't stay in long.
Q. Well, can you tell us approximately how long?
A. About ten minutes, I say.
Q. Say that—
A. About ten minutes, I say.
Q. Then did he come out?
A. Yes.
Q. And who came with him?
A. Elsie and another fellow.
Q. Elsie came with him and another fellow?
A. Yes.
Q. Is that right?
A. That is right, yes, sir.
Q. And did they all get in the car?
A. Yes, sir.
Q. And how did they get in the car? Who sat
page 43 } where?
A. Oh, she and her friend sat in the—Walker—sat in the back.
Q. Elsie and Walker sat in the back?
A. Yes.
Q. Who sat up front with you?
A. The other fellow that was with him.
Q. What is his name?
A. I don't know his name; just call him Popeye, that is all.
Q. You call him Popeye; he sat in front with you?

*Ernest Eugene Davis.*

A. That is right.
Q. After you left Elsie's house, where did you go?
A. Straight on to Hobson.
Q. And after you got to Hobson, did anyone get out of the car?
A. Yes, sir; both of the mens got out.
Q. Both of the men got out?
A. Yes.
Q. And then what did you decide to do?
A. Come on back home.
Q. Come on back home?
A. Yes.
Q. And did Elsie stay in the back seat?
A. No. She got up in the front.
Q. She got up in the front?
page 44 } A. Yes, sir.
Q. And you say how long after you left Hobson before she went to sleep as far as you know?
A. It wasn't long after we got out of Hobson, come back on the main highway.
Q. Were you sleepy at all, as you remember, driving to Hobson?
A. No, sir.
Q. Do you remember being at all sleepy after you left Hobson—
A. No, sir.
Q. —coming back to Portsmouth.

Mr. Bangel: If Your Honor please, I hesitate to stand up and object. Mr. Rixey has been leading the witness; certainly the last questions were leading. We would have to object to them.
Mr. Rixey: I will rephrase the question, Your Honor.

By Mr. Rixey:
Q. Ernest, how were you functioning as you drove back from Hobson to Portsmouth?
A. All right.
Q. You have previously said you went to sleep when you were about halfway up the bridge?
A. That is right.
page 45 } Q. Would you state whether or not you had been either sleepy or drowsy before then?
A. No, sir.
Q. And how old are you?

*Ernest Eugene Davis.*

A. 26.
Q. Were you due to go to work that day?
A. No, sir.

Mr. Rixey: That is all we have for the present with this defendant, Your Honor.

## RE-DIRECT EXAMINATION.

By Mr. Bangel:
Q. Ernest, let me see if I understand something here. Isn't it true that you first saw Elsie that night around 12:00, 1:00 o'clock?
A. No, sir.
Q. And isn't it true that you went around her house about that time?
A. Not that time.
Q. Didn't you go around there and tell her that two of your friends wanted a ride back to Hobson and ask her if she wanted a ride up there?
A. No, I didn't.
Q. Didn't you then leave and go to Hobson and
page 46 } take her—what is the girl's name?—drop her off at a girl's house by the name of Annie and tell her you would be right back for her?
A. Did I drop her off at a girl's house called Annie?
Q. Yes.
A. No, I didn't.
Q. Isn't it true that you left her there and didn't come back until some hours later, you found her sleeping in Annie's room, sleeping, waiting for you to come take her back home?
A. No.
Q. Do you deny going to Annie's house to pick her up—
A. That is right.
Q. —on your way back home to Portsmouth. How long does it take to go from Hobson to Portsmouth?
A. I will say about 25 minutes.
Q. It is just a little settlement on the other side of Churchland, is that right?
A. That is right.
Q. And you want this jury to believe that you—

Mr. Rixey: If Your Honor please—excuse me; finish your question.

*Ernest Eugene Davis.*

page 47 } By Mr. Bangel:

Q. —that you, riding along, driving down there, and for no reason at all you just dozed right off, is that right?

Mr. Rixey: Wait a minute, Ernest; don't answer yet. If Your Honor please, I object to the question. First of all, I think that the way in which it is phrased, "Do you want this jury to believe"—

Mr. Bangel: I will rephrase it.

Mr. Rixey: —is certainly improper. The second point I make is that I submit to Your Honor, Mr. Bangel is arguing with the witness in the form of his question. I object to it.

By Mr. Bangel:

Q. Ernest, do I take your testimony to mean that you were driving along and without any prior doziness or warning whatsoever, your eyes just closed on you?

A. That is right, sir.

Q. And that caused the accident?

A. Yes, sir.

Mr. Bangel: That is all.

RE-CROSS EXAMINATION.

By Mr. Rixey:

Q. Ernest, did you have a date with Elsie Sykes page 48 } that night or morning?

A. No, I didn't.

Q. Have you ever had a date with her?

A. No, sir.

Q. Ever gone out with her?

A. I mean, what you mean? Just me?

Q. Just you and her.

A. No, sir.

Q. Do you know whether or not Wink Walker had a date with her?

A. Not as I know.

Q. Do you know who had a date with her?

A. No, not as I knows, no one.

Mr. Rixey: All right. That is all.

*Elsie Lee Sykes.*

RE-DIRECT EXAMINATION II.

By Mr. Bangel:

Q. As a matter of fact, you told her you were taking these two boys to Hobson, wanted to know if she wanted a ride up there, and she rode on up there with you, isn't that right?

A. I didn't ask her that.

Q. She is not your girl friend, is she?

A. No, sir.

page 49 } Mr. Bangel: That is all.

Mr. Rixey: That is all, Ernest. You can come down.

ELSIE LEE SYKES,

the plaintiff, having been first duly sworn, testified as follows:

Examined by Mr. Bangel:

Q. State your name, please.

A. Elsie Lee Sykes.

Q. Where do you live, Elsie?

A. 1222 Florida Avenue.

Q. How old are you?

A. Thirty.

Q. Were you riding in an automobile operated by Ernest Eugene Davis?

A. Yes, sir.

Q. When it was involved in a collision, 21 November, last year?

A. Yes, sir, I was.

Q. Where were you coming from and in what direction were you going, Elsie?

A. We were coming from Hobson.

Q. Coming toward Portsmouth?

page 50 } A. Portsmouth.

Q. Now, at the time this collision occurred what, if anything, were you doing?

A. At the time? I was asleep. I don't know what happened.

Q. Where were you sitting in the car?

A. In the front seat on the right-hand side.

Q. Do you know how the collision occurred? You say you were asleep; do you know anything about how the accident happened?

A. No, sir, I don't.

*Elsie Lee Sykes.*

Q. What is the first thing you remember after this collision occurred?

A. The first thing I remember after it occurred, when the ambulance came and put me on the stretcher. That is all I remember.

Q. When is the next time you remember anything?

A. Woke up in Maryview Hospital that Saturday morning.

Q. Where were you then? Where were you?

A. In Maryview Hospital.

Q. How long were you confined in Maryview Hospital?

A. From November until January 3rd.

(Mr. Bangel showed opposing counsel some papers.)

By Mr. Bangel:

Q. I believe you testified that you were confined
page 51 } to Maryview Hospital—

A. That is right.

Q. —as a result of injuries sustained?

A. That is right.

Mr. Bangel: If Your Honor please, I offer as Plaintiff's Exhibit 3 a group of hospital sheets from Maryview Hospital totaling 1,084.55.

(The papers referred to were marked Plaintiff's Exhibit 3.)

Mr. Bangel: I offer into evidence another statement from Maryview Hospital in the amount of $88, for X-rays.

The Court: It will be Plaintiff's Exhibit 4.

(The statement referred to was marked Plaintiff's Exhibit 4.)

Mr. Bangel: And also further statement from Maryview Hospital in the amount of $153.15.

The Court: Plaintiff's Exhibit 5.

(The statement referred to was marked Plaintiff's Exhibit 5.)

Mr. Bangel: If Your Honor please, I am informed that Dr. Eberly has arrived. I think the only thing I have asked this witness is as to the fact that she was taken from the scene to

the hospital. If, merely as a courtesy to him, if there is no objection—

page 52 } Mr. Rixey: No objection from us; it is perfectly all right.

Mr. Bangel: —if we could have her leave the witness stand, and put the doctor on, and then put her back.

The Court: All right.

Mr. Bangel: Thank you.

DR. BYRON T. EBERLY,

called as a witness on behalf of the plaintiff, and having been first duly sworn, testified as follows:

Examined by Mr. Bangel:

Q. State your name, please, sir.

A. Dr. Byron Thomas Eberly.

Q. Dr. Elberly, you are a practicing physician in the City of Portsmouth?

A. Yes, sir. I have been in practice here for approximately five years now.

Q. Where is your office located, sir?

A. 3315 County Street.

Q. Doctor, what medical school did you attend?

A. I attended Jefferson Medical College of Philadelphia, Pennsylvania.

page 53 } Q. When did you graduate?

A. In 1947.

Q. Upon your graduation, did you then take further internship or training after graduation from medical school?

A. Yes. I took a twelve months' rotating internship and then a period of four and a half years of specialty training in ear, nose and throat. Otorhinolaryngology is the specific term.

Q. What is that term, sir?

A. Otorhinolaryngology.

Q. Is that a specialty field in and of itself?

A. Yes. It is a division that has been made since the turn of 1940. They used to consider the eyes and ear, nose and throat together; but today the eye is one specialty and the rest of the head and neck is another specialty.

Q. You say you have been practicing your specialty here in Portsmouth for the past five years?

A. Yes, sir.

Q. As part of your specialty, Doctor, is the treatment of facial fractures also included?

*Dr. Byron T. Eberly.*

A. Yes. That is part of this specialty, is the treatment of traumatic injuries to the head and neck. It encompasses the treatment of tumors and diseases of the ear, nose and throat and, of course, automobile injuries or any traumatic injury involving the face comes under my care.

page 54 } Q. Are you on any staffs here, any hospital staffs?

A. Yes. I am a full staff member at Maryview Hospital and Portsmouth General Hospital and courtesy member at Norfolk General and Obici.

Q. Doctor, in your professional capacity did you have occasion to see Elsie Lee Sykes and treat her for injuries sustained in an automobile collision which occurred on November 21, of last year?

A. Yes, I did. May I just pull my office cards out?

Q. Surely; it is perfectly all right.

A. On the cards here, I saw her over at Maryview Hospital the morning of the injury and I believe that was November 23rd. At least I may have—

Q. 21, I believe.

A. 21. This is the date that was put on the card in the office there. It was November 21. And at that time it was a matter of probably a half an hour to 45 minutes after the accident which happened; and she had severe injuries of the face and I will say head and neck; I will preface it that way. The original injuries were a lot of severe, soft-tissue lacerations to the face and, of course, on further study and X-ray examination she had marked fractures of the midface, which is the maxilla, the midpart of the face, and the jaw, was fractured in three difference places, severe frac-

page 55 } tures. Anway, it was excessive injuries, one of the most excessive ones that you get where the person survives.

Q. Were there any injuries to other parts of her body in addition to the extensive injuries to her face, head and neck?

A. They all, injuries of that severe nature, sustain a moderate amount of—well, when I bring in the term "whiplash injury," I am not trying to establish some other injury that I haven't cared for; but that goes along with the severe facial injury to a moderate degree. And that usually—they usually recover. The other injuries, she had some soft-tissue bruises to the rest of the body and also a fracture, some fracture of the thoracic cage ribs. These simple fractures, of course, heal without too much care; they don't require too much care to get them to heal, of the chest. They are very

*Dr. Byron T. Eberly.*

annoying, painful for approximately three weeks.

Q. Doctor, with reference to the injury sustained to her head, you say that she had severe fractures. What type of fractures were they?

A. The fractures as I would list them so that they can be easily understood in a category, the fractures of the face that she, Elsie, sustained, the most severe form for final healing are the fractures of the mandible, for one

page 56 } thing. She suffered two very large fractures, one that displaced the mandible on the right side, way out of line, probably three or four centimeters, and another fracture right near the midline, approximately two or three centimeters from the midline of the jaw. These fractures were, of course, well out of position and they required not only the original work of temporary reduction of the fractures when I first saw her that morning of the 21st, but then I had to also take her back into the operating room on two more occasions. The original work on the morning of the 21st was to close all soft-tissue lacerations and to make sure that the immediate emergency of bleeding was controlled. And then within five or six days after that, it required taking her back and reducing these fractures of the mandible which—

Q. Excuse me. You say the mandible. For us laymen, what is the mandible?

A. I am sorry. The jaw itself, the fractures of the jawbone. Now, those were the most extensive. The other thing complicated it. When I said midface, I mean the bones between the eyes and the jawbone. That is the maxilla and that was fractured in three different positions on her. When I say three different positions, you can have a maxilla—when it is in position, it has got to be in good alignment for closing, proper chewing and biting. In her

page 57 } case, not only the jaw is fractured, the mandible fractured severely enough it was driven backward and upward; it was out of alignment. It necessitated, of course, wiring and getting that reduced properly. It required a lot of—well, I will say in a sense, orthopedic work. When I say orthopedic work, I refer to the bone doctors. Materials up in the face with pins and it is quite a gadget to get these in a position to hold them for a period of six to eight weeks in which the patient wears a pretty severe looking contrivance all over her face to hold those in position for that period before they get in stable union.

Q. Doctor, would a photograph help you describe the facial expression?

*Dr. Byron T. Eberly.*

A. I would like to see a photograph if you have one of her face at that time.

Q. I hand you this photograph and ask you if that is the matter—

A. Yes, I think that would help a lot in explaining the position I am trying to put across as far as the work that had to be done for a period of eight to ten weeks.

Mr. Rixey: Your Honor, I object to the photograph, the use of the photograph. The doctor has just gone into it and I think he can describe it adequately without the use of any photograph. It is obviously used for inflammatory page 58 } purposes. That is the purpose of the photograph in its blown-up stage. I don't think the doctor needs it. He can certainly describe it. He has already described it and he can do it adequately. I would object to the introduction of the photograph.

The Court: Let me see it. (Examining)

Mr. Bangel: As a matter of fact, I believe the doctor said a photograph would help him, in order to be able to describe the apparatus that was necessary.

The Court: I think he did. I overrule your objection.

Mr. Rixey: All right. I save the point.

The Court: Exhibit 6.

Mr. Rixey: Note an exception.

(The photograph referred to was marked Plaintiff's Exhibit 6.)

The Witness: If I am able to talk right now—I don't know if I am in order or not.

By Mr. Bangel:

Q. Now, Doctor, I hand you this photograph which has been marked Plaintiff's Exhibit 6 and ask you if you will, sir, show us the apparatus that you were speaking of, and point out on the photograph, describe the—

A. Well, I didn't—want to state that I hadn't made any mention, I don't think I have seen a photograph before. I thought it would be, might be apropos, for my own page 59 } mind, describe the medical point of view. It is hard for anyone not next to these patients every day to even place the jawbone maxilla and fracture she sustained unless you do go into it a bit. The apparatus I have here is merely—it is an external pinning device to hold these

*Dr. Byron T. Eberly.*

fractures. As I said, they look like quite a bit of gadgetry, and it is. What you see here is just merely the external pining device holding these positions of the fracture she suffered in the right side and, of course, towards the left. This is just some soft-tissue scar closed at the time, the first morning. Now, what is hidden—there is internal wiring hidden up here in the maxilla. This is the bone between the eyes and the jawbone. That, of course, is brought into position; so, finally, the final work after we now have it this stage—this is March 3rd?

Q. Yes, sir, 3rd of March.

A. 3rd of March. She is in line now for a period of another six to nine months of restorative care. This is the immediate—eight to twelve weeks is the initial bone repair. And the mandible has healed very satisfactorily. It did require some injection. You have a bad thing to treat here. Infections of the jaw happen with these severe fractures. They have to be taken in the operating room a third time, drain an abcess near this one fracture site. All that had to be done. Eight to ten per cent get infected pretty
page 60 } badly.

Mr. Rixey: If Your Honor please—excuse me just a minute. I would like for the doctor to confine himself to this particular patient without talking about what 80 per cent of them get, that sort of thing. If she has infection, let him tell about it; if she didn't, the Court might suggest that he not mention it.

The Court: Yes.

By Mr. Bangel:

Q. Doctor, what, if anything, was done for this patient to prevent infection?

A. Well, as I say, she was carried on very heavy penicillin and antibiotic levels for a period of three weeks to a month, to prevent infection. Of course, we have so many resistent bacteria today that in her case the bacteria grew despite the antibiotics and it had to be drained externally with a separate operation.

Q. Doctor, you testified that you saw her that first time in the hospital. What, if anything, was done to her initially when she was brought to the hospital?

A. Repeating some things I think I said; maybe I wasn't too clear.

*Dr. Byron T. Eberly.*

Q. If you covered it, I didn't hear you. I will withdraw it if you did.

page 61 } A. The initial work of the initial morning was to close that obvious scar you see in the picture there. And there was internal scars, internal tears and lacerations in the mouth that were closed and there were six to eight teeth that I removed that morning that were just obviously fractures, from their sites in the jawbone and the maxilla, the bone above. All that was done the initial morning. What you see in the picture was done on the second operation, and a third operation there was internal wiring done that you don't see.

Q. What do you mean by internal wiring, Doctor?

A. I am referring to use of not only wires but firm, short metallic pins that are placed internally through the ends of the fractured bones to hold them in position.

Q. They are not visible on the photograph?

A. No, they are not visible.

Q. The wires you are talking about and pins, Doctor, with reference to the treatment of these injuries: was that a painful type of injuries?

A. This particular patient had pain that required narcotics for a period of approximately three to four weeks.

Q. The fractures that you speak of, would they be described as simple or compound?

A. No, this is compound, comminuted fractures. I am referring to multiple fractures. Comminuted com-

page 62 } pound means they are exposed to the air, if I can describe that.

Q. To make sure that I understand it, Doctor, comminuted means what now, sir?

A. Means just multiple, more than one; or one area has several fracture lines going through; two different bones may have four fracture lines going through it. So you have more than one fracture in one area.

Q. Fragments, is that correct, more than—

A. Correct.

Q. You say "compound." What is the meaning of compound fracture?

A. It means that you have exposure to the air. In other words, the external skin is broken or the internal mucous membrane of the mouth, you can follow that right down to your fracture, which indicates the severity of the fracture in avulsing the soft tissue over it.

*Dr. Byron T. Eberly.*

Q. After the second operation or when you placed this apparatus on her, Doctor, which you say was a week following her admission to the hospital or approximately five or six days, whatever you said; what further treatment did you have to render her?

A. Specifically in regards to her—I won't get shall we say loquacious now; I will try to keep it specific in regards to this patient. Again, in her case for approximately two page 63 } weeks some pinning that you see here on the mandible, held fine but then there was infection in the bed and the one fracture site on the right side went out of position. There was a malunion. In other words, it would heal in a very bad position; and that happens frequently in facial infection. In this case it was infected and I had to go back and do internal pinning of the jaw, which was—necessitated the third operation to hold that in good position, which is being held today. That internal pin is still there and it will be in for another three weeks.

Q. Doctor, with reference to the laceration, or this area on her skin which is shown on this photograph, what if any damage has that done in addition to the scar which we can see?

A. There is a neurological disorder from that scar. In other words, it was deep enough, it penetrated—it was a compound fracture of the jaw. That external wound penetrated to the fracture site and it severed the external nerves that come out of this point of the chin and serve sensation, to about a three to four centimeter area. That sensation is gone. It may recur. It may grow back in the next year. Usually it doesn't, it remains a numb area. It doesn't mean loss of motor function, doesn't impair the use of lips or teeth or chewing. It just means sensation for that area page 64 } is gone. It is the same as if you had an injection from the dentist and your jaw is numb. She has that sensation there all the time.

Q. Numbness?

A. Numbness in that zone.

Q. Doctor, did you find it necessary to readmit her to the hospital in February of this year after her initial discharge in January?

A. Yes. The readmission—yes, the readmission at that time was necessary to remove the metallic splints that you see outside on that photograph, taking those out and that was the principal reason for the admission at that time; under anesthesia removing those pins and removing the wiring that

*Dr. Byron T. Eberly.*

I had done to the midface. That was done. The internal wiring of the jaw, as I say, still remains in for another three weeks.

Q. When she was readmitted to the hospital in February, this year, that is when this apparatus was removed, is that right?

A. Yes, sir.

Q. It remained on her face until then?

A. Yes, sir.

Q. Doctor, did she lose any teeth as a result of the—

A. Initially I removed, I said, six to eight. I am not quite sure how many. I will make a statement here that was removed initially. Due to the severity of the fracture
page 65 } of the face, they were removed since they were obviously fractured away from their root beds; imbedded roots were removed, six to eight; I am not quite clear on the number. The next step forward here would be the use of a prosthedontist or dentist who will restore the artificial teeth that are needed for restoration of the occlusion.

Q. Insofar as concerns the facial fractures, the fractures that you described in the middle of her face and her jaw, what does the future have in store for her prognosis?

A. Well, prognosis as far as the thing we are interested in, this part of the face, you want to have good function. You want to have the patient back to the point where she can chew properly and handle food properly and that part of digestion. And that will be restored in the next six to nine months by the use of the dentist putting in partial plates. So that one function will come back fairly well although she is losing her original teeth and she is going through a lot of fracture work to get her occlusion back. The other thing is the cosmetic appearance. Well, except for the scar on the outside, cosmetically or from the general point of view she will have a fairly conforming looking face for the person. So from the prognosis standpoint, the numbness of the chin, I say, may remain there, possibly will. By further dental restoration she will get fairly good chewing back.
page 66 } That is another six to nine months' work. That is the prognosis, I would say.

Q. How about the malocclusion that she has now?

A. Well, there is a line there. I think the dentist can compensate to some degree. But as I can readily state to you, no matter how either lucky the surgeon is or how well he can reduce these fractures that are well out of line, there is still a certain degree of malocclusion that still will exist. In

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other words, when she bites now, she is off about five to six millimeters over what I suppose she was with her previous dental arch, I don't know. All I saw her was that morning when she had a number of teeth broken away and the condition, and after I removed that I lost my original picture. I have no idea what she was before that because, naturally, I hadn't seen her before the accident.

Q. Is she still under your care and treatment, Doctor?

A. Yes, she is; certainly say under my care and treatment for the remainder of 1960.

Q. Now, you mentioned that you would have to probably remove some other wires which still remain in her face. Would that require further hospitalization?

A. That requires one more admission to the hospital, around three to five or six days, admission and possibly putting her to sleep to remove the embedded wires in the jaw, and that is the final step I expect to take. The rest

page 67 } of the year, of 1960, as I say, will be office follow-ups of approximately a month's interval after her next hospitalization.

Q. Doctor, what is your bill for services rendered to date?

A. I don't recall. I haven't looked. I believe, all told, the work that I have done on her since November, in three stages, I think comes between eight and nine hundred dollars for the work that I have done. I should have looked at—I don't have the card with me.

Q. I have a statement here from you of $825 to date—

A. Right.

Q. —which is dated February. Is that—

A. That is the bill as of today.

Q. Doctor, would you estimate the future medical expenses that Elsie Sykes will have to incur?

Mr. Rixey: This is only from Dr. Eberly, now.

The Witness: I was going to ask him does he mean—do you want me to give an estimate of what I think the prosthedontic work will be, from experience?

Mr. Bangel: Yes, sir.

Mr. Rixey: If Your Honor please, I will object to that. This man is qualified as a specialist in ears, nose and throat. We have allowed him to go a little bit into the

page 68 } orthopedic area. Now they want to qualify him as an expert in the dental field and estimate what the future dental bills are going to be. I object to it. I think it is going too far.

*Dr. Byron T. Eberly.*

Mr. Bangel: If Your Honor please, if I may ask the doctor one question, it will clear the entire matter up.

Mr. Winston: Just for the record, we join in that objection.

By Mr. Bangel:

Q. Doctor, is this type of work which you have done on Elsie and the type of work that has to be done for her, the normal type of work that you do, sir?

A. Yes, sir.

Q. Is this in your line, restoration?

A. In fact, in every specialist—specialists overlap. If I can not only—don't want to digress too far, just want to say it depends on a person's interest. Ear, nose, throat I know; some ear, nose, throat collision; one or two just ear disease, that is all. I particularly like to do maxilla facial injuries. This is traumatic work. After about eleven years of experience in this field, including the four years in residency, I have followed through—I can't give an accurate description, names of a number of cases but it is certainly significant; all the way through to their final prosthedontic re-
page 69 } pair work. I can give a variation of what I think her estimated costs will be on the basis of the experience I have had on the average charge of a dentist. I can't say this one dentist who may see her will charge her exactly this, no; but I believe I have experience to give a fair variation of it. I don't know whether it is significant here but I think it would be.

Mr. Rixey: The point was that he would give what he thinks it would be.

Mr. Bangel: From his experience.

The Court: I think, from his experience, he is entitled to express his opinion. I overrule the objection.

Mr. Rixey: All right, sir. We note an exception.

By Mr. Bangel:

Q. Doctor, would you give us an estimate of total future medical expenses which Elsie will incur as a result of the injuries and restoration as you have described?

A. I would estimate the rest of my medical expenses, including the hospitalization and the remainder of the year's follow-up, certainly in my case will vary not to exceed $200, from $175 to $200 in my case. The most expensive part of the procedure now is the restoration of her occlusion. She

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needs the restoration of these eight teeth. She needs a restoration along the lines of some missing bite on the right side, which included the loss of teeth in the jawbone page 70 } on the right side and in the maxilla. I would estimate from my experience that it will require a prosthedontist, which is particularly a dentist who is interested in this, maxilla facial injuries. This is more than the average partial plate. It will require possibly removal of at least four or five teeth.

Mr. Rixey: Your Honor—excuse me; "will require possibly." Now, we have let this thing go by in an effort to be fair to the plaintiff and an effort not to keep objecting; but I submit to Your Honor that that is objectionable, for this doctor to testify as to what he thinks and to what possibly might occur, is certainly improper.

The Court: I think that would be limited to probabilities. I think he is qualified to express an opinion based on probability.

Mr. Rixey: Your Honor, I think we ought to inquire what his experience has been in this field, whether he has done it himself or how many he has seen or how many dentists he is aware of, how many of these parties that have had bills, that sort of thing that he knows about.

The Court: I think he has established his experience by saying that he has worked with this sort of cases all the way through for the last eleven years. I think page 71 } that is all the qualification he needs.

Mr. Rixey: We save the point.

The Court: Doctor, I think that in matters of this kind it should be limited to probabilities—

The Witness: All right.

The Court: —not possibilities.

By Mr. Bangel:

Q. Doctor, let me say this to you: we are asking that you give us just an approximation. In your opinion, what do you think the probable future medical expense will be for the plaintiff, Elsie Sykes? And you may think for a second if you want. By that I mean your bill, future treatment that you would have to render, the hospitalization, and the teeth restoration.

A. Well, I think I know what you are driving at as far as her total cost. I probably have been hinting all around it and using the term "possible" when "probable" should be

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used. The probable medical cost—I won't say probable; I know my cost will certainly not exceed 200. That is carrying it through 1960. As far as I am concerned at that time I will be through with her, total care. The probable hospitalization expense over what she has incurred of we will say four or five days, will—again, you would have to almost call a miracle to find out the daily rate. I will say probably will go $300, $250 to $300.

page 72 } By Mr. Rixey:

Q. How much?

A. $250 to $300, I would think. Again, the basis of the total cost and breakdown, I don't know just how they break it down. Then I would say probably the dental bill—I am going to give variation here, but from experience and from the talk to the patients and to the dentists and the problems they have met in the total cost, it will probably vary between five and seven hundred dollars would be my estimate of the restoration. That is, dental bills I guess run high; but they do run high on the basis it takes a lot of man hours, a lot of work to do the work that is necessary in her mouth.

Mr. Bangel: That is all.

CROSS EXAMINATION.

By Mr. Rixey:

Q. Dr. Eberly, you have referred to either six or eight teeth that were taken out. Do you know how many there were?

A. No. I—

Q. Did you prepare, Doctor, for your testimony here today by reviewing the record of Elsie Lee Sykes?

A. It has probably been four or five days. I am

page 73 } confused now. I believe it was, I say, six to eight teeth. I think that is the figure. It certainly doesn't exceed that. I am a little hazy on that initial work there. It is possibly—see, if I can't name the exact number of teeth at the moment, it is in the operative record at that—the time I work on it.

Q. Don't you feel it is important to be exact about that sort of thing, Doctor?

Mr. Bangel: If Your Honor please, the doctor is trying to be as accurate as he can. I have a report from him. Without objection, I am perfectly willing—I am sure he checked the

records in preparing this. If this is his original report, maybe it will help him refresh his memory as to the exact number of teeth.

Mr. Rixey: I think we can get to the point. Just a minute. I don't think this man needs Mr. Bangel to help him testify. He seems to be able to take care of himself, I think.

By Mr. Rixey:

Q. Do you think it is important to be exact as to the number of teeth that are missing, Doctor?

A. Well, I don't feel it was important in the line of work that the first—I wasn't worried as to the total damaged teeth that morning. I was more worried about the emergency treatment. Now, it is in the record. As I say, page 74 } possibly I should have made a complete note as to the exact number of teeth. It is six to eight, I am pretty sure. That is well within the range that was taken out.

Q. If your report of February 24th stated that the loss was six teeth, would that be correct, sir?

A. I am sure that would be correct.

Q. Would you like to examine the report that Mr. Bangel has from you?

A. If I may.

Q. All right. I am perfectly willing for you to; and I refer you to the last few words of the first paragraph.

A. Well, that specifically says the loss of six teeth. That is right.

Q. Then six is correct, is that right, Doctor?

A. Right.

Q. Doctor, have you ever done any of the dental work that you just estimated the bill on?

A. No. The actual restoration, prosthedontic work is done by a doctor of dental surgery.

Q. Who has an entirely separate field from yours?

A. Well, again, we have merging fields. This is a question of traumatic injuries of the face that the dentist is not qualified to handle.

Q. I understand. It is a different field from yours?

A. It is a different field, yes, sir.

page 75 } Q. As a matter of fact, the dentist goes to a different type of school than an M. D., is that correct?

A. Yes, sir.

Q. And you are an M. D.?

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A. Right.

Q. You have never done any of the type of dental work that you have just talked about, have you?

A. I have never done the dental restoration work I talked about. I was exposed to it by, I say, working closely with the dentist on his cases.

Q. When you are exposed and working with dentists in these cases, do you usually follow it right up to the very end and ask the dentist how much he charged for it?

A. No, but by indirect questions, by asking the patient. When I follow them for nine months to a year after a serious injury and they come back to my office with their restorations completed, I am somewhat interested to know how much they are being charged for certain work, and it is from that information that I have made my estimate, previous.

Q. It is what other people tell you, what your patients tell you, is that correct?

A. What my patients tell me.

Q. Not what the doctors themselves tell you, is that correct? Not what the dentists themselves tell you?

page 76 } A. That is true.

Q. It is what you hear from your patients during the course of winding up your treatment of them?

A. Correct.

Mr. Rixey: Your Honor, on the basis of that we again ask the Court to exclude that evidence.

The Court: I overrule the objection.

Mr. Rixey: We save the point again.

Mr. Winston: Note our objection and exception for the record, Miss Alfriend.

By Mr. Rixey:

Q. Now, Doctor, just one or two more questions. As the specialist who treated Elsie Sykes, are you pleased with her progress?

A. Yes, I say I am pleased with the progress, with the severe injury she has had.

Q. We are now a little less than two and a half months from the occurrence of the accident; and would you say that this girl has made a good recovery?

A. Yes, I would say so.

Q. In view of the seriousness of her injuries, the many fractures that she had and the complications, would you describe her recovery as a rather remarkable recovery?

*Margaret Jones.*

A. I wouldn't say remarkable. I would say it is what I would expect to get with the—well, just phrase it
page 77 } average good care that a patient should get with these fractures.

Q. She has had average good care?

A. I would say.

Q. And she has had a good recovery?

A. Yes, sir.

Mr. Rixey: Thank you very much, Doctor; I appreciate it. Mr. Winston?

Mr. Winston: No questions.

Mr. Bangel: If Your Honor please, Mr. Rixey is raising the issue as to the actual cost of the dental repairs to this patient. We have no objection to the Court instructing the jury to disregard that particular estimate if Mr. Rixey feels that he is insisting on that coming out of it. We will attempt to introduce it in some other way.

The Court: You are, in effect, joining in his motion. I will so instruct the jury. Gentlemen of the jury, in view of the statements that have been made that you have heard here in open court, the cost of the dental work as included in Dr. Eberly's testimony will be eliminated and disregarded, if you will.

Mr. Bangel: With reference to the teeth, of course.

The Court: That is what I say, the cost of the
page 78 } dental work. That does not apply to the nature of the work that has to be done which he has previously testified to, but only the cost.

Mr. Bangel: Yes, sir. That is all. Thank you, Doctor.

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MARGARET JONES,

called as a witness on behalf of the plaintiff, and having been first duly sworn, testified as follows:

Examined by Mr. Bangel:

Q. State your name, please.
page 80 } A. Margaret Jones.
Q. Where do you live, Mrs. Jones?

*Margaret Jones.*

A. 208 Norman Road.
Q. Here in Portsmouth?
A. Yes.
Q. Mrs. Jones, do you know Elsie Lee Sykes?
A. I have known Elsie for a long time.
Q. When did she first start working for you?
A. Fourteen or fifteen years ago.
Q. Mrs. Jones, was she working for you in November of last year?
A. Yes, she was.
Q. At the time she had this collision?
A. (The witness nodded).
Q. How much was she earning a week, Mrs. Jones?
A. $35.
Q. What type of work did she do?
A. Elsie did most everything. She kept my house beautifully. I work, of course. She cooked. She looked after my mother, who has been an invalid for many years, so she did nursing and general housework and all of my laundry.
Q. Mrs. Jones, do you know the general reputation of Elsie Lee Sykes for truth and veracity?

page 81 } Mr. Rixey: Excuse me, please, Mrs. Jones. We object to the question, Your Honor. I don't see that the reputation of Elsie Sykes has been questioned here today. Even understanding that this witness is called out of turn and that Elsie Sykes might testify and then Mrs. Jones would be called, I can't see where Elsie's reputation is in question. I object to the question.

Mr. Bangel: Truth and veracity.

The Court: Mr. Rixey, I understood that you had no objection to her being taken out of turn. Mr. Bangel said for what reason he was calling the witness.

Mr. Rixey: I do not have any objection to her examination out of turn. I stated to the Court that I might have some objections to the type of evidence that she would be called upon to give.

The Court: Mr. Bangel said what he was going to ask her. I am going to sustain the objection. We will adjourn until 20 minutes to 2:00; and let Mr. Bangel call the witness back again in the regular course.

* * * * *

page 83 }

*Elsie Lee Sykes.*

* * * * *

ELSIE LEE SYKES,
recalled, testified further as follows:

Examined by Mr. Bangel:

Q. Elsie, you were previously on the witness stand and when the doctor arrived we asked you to step down. Continuing with your testimony—I don't believe we got very far—let me ask you this: When did you first see Ernest Davis just prior to this accident that night?

A. 11:30.

Q. Where did you see him?

A. At my residence.

Q. Did he come by there?

A. Yes, sir, he did.

Q. And what, if anything, did he say?

A. He asked me would I like to ride to Hobson to take some of his friends home. I told him I wouldn't mind for I didn't have anything else to do.

Q. Excuse me.

Mr. Bangel: I will ask you gentlemen, can you understand her?

page 84 } (Indication in the negative from the jury.)

By Mr. Bangel:

Q. I think it would be better if you sort of looked toward the Judge, sort of in the center here, and talk slow. And I realize the difficulty you have having, but try to pronounce the words as clear as you can.

A. I will.

Q. Did you go to Hobson with him?

A. Yes, sir, I did.

Q. And where did you go?

A. We went to take the two friends home and we dropped them off. And we stopped at Annie's house, a friend of mine.

Q. Annie?

A. Yes, Annie Brinkley.

Q. Annie Brinkley?

A. That is right.

Q. What time did you get to Annie's house?

A. 12 midnight.

*Elsie Lee Sykes.*

Q. Now, when you got to Annie's house, what if anything did Ernest Davis do?

A. He dropped me off and I—at Annie's door. I knocked and she let me in. Ernest said "I will be back after you in a few minutes." I said "O. K." He said "Stay here until I get back." I said "O. K." I sat and wait for Ernest, Annie and I talking.

page 85 } Q. I am sorry, go ahead. You said Annie and you—

A. —were talking.

Q. Who else was there, if anyone?

A. She say her mother and father were upstairs.

Q. They were sleeping?

A. Yes, they was.

Q. All right. Then tell us what happened.

A. So around 12:30 we were still talking, as women will do is talk over what happened. So around 1:00 o'clock Annie said "Elsie, I am getting"—

Mr. Rixey: If Your Honor please, I would object to anything anybody said.

The Court: Don't give any conversation with anybody else unless Mr. Davis was there.

By Mr. Bangel:

Q. All right. What did you do then? What did Annie do?

A. Around 1:00 o'clock Annie began to get sleepy and say "Elsie, if you get"—

Q. Excuse me, Elsie. The Judge said you can't testify as to what Annie said to you, but you can testify as to what you did and what Annie did, if you know.

A. Yes. I laid on Annie's lounge chair in the living room and I fell asleep.

Q. All right. Before you fell asleep do you know page 86 } what Annie did?

A. She said she was sleepy.

Q. Well, all right; you can't—what is the next thing you knew?

A. Next thing I knew, I was sleepy, I was sleeping on the lounging chair.

Q. After that, what is the next thing that you did?

A. After that, around early the next morning Annie awakened me and say Ernest was here "to take you home." The time I don't know.

*Elsie Lee Sykes.*

Q. So what did you do?
A. I got up and I got my coat and got into the car.
Q. When you got in the car was there anyone else in the car besides Ernest?
A. No one but Ernest.
Q. What did you all do then?
A. We started towards Portsmouth.
Q. What did you do?
A. I fell asleep.
Q. I take it you don't know what happened, how the accident occurred?
A. No, I don't know.
Q. The next thing that you knew, where were you?
A. In Maryview Hospital.
Q. How long did you have to remain in the hos-
page 87 } pital, Elsie?
A. From November 21 to January 4th—3rd.
Q. Let me ask you, when you were first admitted after you came to, knew where you were, were you suffering any pain?
A. Yes, I were.
Q. What was hurting?
A. I was hurting all over; and my face was swollen real bad. It was terrible pains.
Q. You say your face was swollen?
A. Yes.
Q. I notice that the right side of your face appears to be larger than the left side now. Was that different in the size of your face? Did that exist prior to this accident?
A. Yes.
Q. Before the accident happened?
A. No. My face were normal before the accident happened.
Q. All right. So you say you woke up, your face was swollen and you were in pain; anything else hurting you?
A. Yes. My side and my chest, and I was hurting all over, but most hurting part was my face and my chest. And I had bruise on my hands and both of my legs.
Q. Did they operate on you?
A. We—that following Saturday they operated
page 88 } on me.
Q. How many operations did you have while you were there?
A. I had three.
Q. Did they place anything in your mouth or around the outside of your face?

*Elsie Lee Sykes.*

A. Yes. I have braces inside of my mouth and clamps on the outside.

Q. When did they put the clamps on the outside?

A. That Saturday week.

Q. When did they take them off? When I speak of "they," who put them on there? You are speaking of Dr. Eberly, aren't you?

A. Yes.

Q. When did Dr. Eberly remove them?

A. He removed them in February.

Q. Is that when you went back to the—

A. Yes, I went back to—

Q. —the hospital?

A. That is right.

Q. After your initial awakening in the hospital and the rest of your stay there, were you suffering any pain?

A. Yes, I was.

Q. Were they giving you anything, any medicine or anything?

A. Yes, they were giving me medicine and shots, page 89 } also.

Q. The operations that you speak of, were you awake when they were performed?

A. No, I wasn't.

Q. They put you to sleep?

A. Yes, they did.

Q. While you were in the hospital, were you confined to bed?

A. I was confined to bed for four weeks.

Q. And were you able to eat anything?

A. I wasn't able to eat anything. All I could do was drink liquids.

Q. You could drink liquids?

A. That is all.

Q. Did you lose any weight?

A. Yes, I have lost weight.

Q. How much did you lose?

A. I can't say. I know I was much larger than what I am now.

Q. Could you open your mouth during that time?

A. What? Before the accident?

Q. No, after the accident.

A. No, I couldn't open my mouth.

Q. Can you open your mouth all the way now?

A. No, sir, I can't.

*Elsie Lee Sykes.*

Q. The injury sustained by you, does that have
page 90 } anything to do with the way you drink?
A. Yes, sir.
Q. I am sorry; the way you speak?
A. Yes, sir, it do.
Q. And does it affect your eating?
A. It has.
Q. And you have to drink now, is that right?
A. Yes, sir.
Q. Well, the liquids; do you survive on liquids alone?
A. Mostly I eat oatmeal.
Q. Oatmeal?
A. Yes.
Q. All right. Has it had any effect on the way you talk?
A. Yes, sir, it has.
Q. Did you have any difficulty talking before this accident?
A. No, sir, I never had any difficulty talking.
Q. How wide can you open your mouth now, Elsie?
A. (Witness demonstrating).
Q. Are you having any trouble now?
A. Yes, I have.
Q. What, if anything, is hurting you now?
A. My chest hurt all the time and my side, and I
page 91 } keeps a terrible headache all the time.
Q. I notice—
A. And I don't have no feeling in my lip and none in my chin.
Q. Have no feeling there?
A. No feeling at all.
Q. Speaking of that area where the scar is?
A. Yes, sir.
Q. Now, in addition to that scar, were you operated on any other place, any other scars?
A. I were operated on behind my neck (indicating).
Q. Does it hurt you when you open your mouth now?
A. Yes, sir, it do.
Q. Elsie, where were you working in November of this year?
A. For Mr. and Mrs. Cecil E. Jones.
Q. What type of work did you do?
A. I was a practical nurse; her housekeeper and a cook.
Q. How much were you earning?
A. $35 a week.
Q. Have you been able to go back to work?
A. No, sir, I haven't.

*Elsie Lee Sykes.*

Q. Are you able to work now?
A. No, sir, I am not.
page 92 } Q. Why not?
A. Because I—because I am still sore and my face still bothering me and so the doctor, so he don't know when I will be able to go back.

Mr. Rixey: Wait a minute now.
Mr. Bangel: You can't say what someone else told you. That is all.

CROSS EXAMINATION.

By Mr. Rixey:
Q. Elsie, show me; let me see those scars.
A. (Witness showing).
Q. The one on your chin is where the—
A. Where I don't have any feeling.
Q. Right. And you have a scar around here on the side?
A. Operate three times around there.
Q. How about on the right side?
A. No, I wasn't operated on the right side.
Q. What scars are they?
A. That came from the clamp running through my jaw.
Q. Running through your jaw. All right; now, how old are you?
page 93 } A. Thirty.
Q. And how much education have you had, Elsie?
A. Two years of high school.
Q. What is that?
A. Two high.
Q. You got up to high school?
A. To two years of high school.
Q. Two years of high school?
A. Yes.
Q. How many years, altogether, is that?

Mr. Bangel: If Your Honor please, I don't think that is material to the case at bar. I object to going into anything of that nature.
Mr. Rixey: It is on cross examination. I think I have a right to.
The Court: Cross examination.
Mr. Bangel: What does that have to do with the happening of this accident, if Your Honor please?

*Elsie Lee Sykes.*

The Court: I don't know. I can't say that it is immaterial.
Mr. Bangel: All right, sir.

By Mr. Rixey:
Q. How many grades did you go to school?
A. Through the ninth grade.
Q. Through the ninth grade?
ptge 94 } A. Yes.
Q. How old were you when you got through the ninth grade?
A. (Witness pausing).
Q. Can you tell us, approximately?
A. Wait a minute; let me think. (Pausing)
Q. Excuse me. Can you tell us how long you have been working for Mrs. Jones?
A. Fifteen years.
Q. Well, if you are thirty years old now, how old would you have been when you started working for her?
A. (Witness pausing).
Q. You don't rightly know?
A. No, I don't.
Q. All right. Have you been working full time for Mrs. Jones for fifteen years?
A. Beg pardon?
Q. Have you been working full time for Mrs. Jones for fifteen years?
A. Off and on.
Q. Off and on; not steady?
A. Most of the time was steady.
Q. How long before this accident had you been working for her at $35 a week?
A. Two years.
page 95 } Q. And that was steady, was it?
A. Yes, it was.
Q. And how many days a week did you have to work?
A. Seven days.
Q. Seven days a week?
A. Yes, sir.
Q. No time off?
A. No time off.
Q. What were your hours?
A. I go on at 9:30 in the morning and get off at 7:00 at night.
Q. 9:30 in the morning, 7:00 P. M. at night?
A. That is right.

*Elsie Lee Sykes.*

Q. The morning that this accident happened were you going to work?
A. I was supposed to go to work that Saturday morning.
Q. You were supposed to be at work that morning at 9:30, is that right?
A. That is right.
Q. Let's go back to the day before, which was Friday the 20th of November. Did you go to work that day?
A. Yes, I did.
Q. What time did you go to work?
A. What time did I go to work?
*A*. That is right.
page 96 } A. Around 11:00 o'clock.
Q. You didn't go to work until 11:00 o'clock that Friday morning?
A. No, I didn't.
Q. Do you know what time you got up that morning?
A. I gotten up around 9:30 or 20 minutes to 10:00.
Q. Why were you later that morning than usual?
A. Why was I later that morning than usual?
Q. That is right.
A. I was just late going to work.
Q. You were late going to work Friday morning, is that right?
A. Yes, I was.
Q. Didn't get there until around 11:00 o'clock?
A. That is right.
Q. Had you been out late the night before?
A. No, I hadn't.
Q. Did you just oversleep?
A. I did.
Q. You got off work what time? 7:00 o'clock that night?
A. I went—
Q. Where did you go when you went off work?
A. Home.
Q. Where is your home?
page 97 } A. 1222 Florida Avenue.
Q. How long did you stay there?
A. I stayed at home until Ernest came there.
Q. What time was that?
A. 11:30.
Q. Around 11:30 P. M. Ernest came to your house?
A. Yes, he did.
Q. Did he have anybody with him?
A. He had two of his friends in the back seat of his car.

*Elsie Lee Sykes.*

Q. Two of his friends in the back seat of his car?
A. Yes, sir, he did.
Q. Who were those friends?
A. Wink Walker and a man they call, name of Popeye; that is all I know is Popeye.
Q. I see. Let me ask what your marital status is. Are you married?
A. Yes, I am.
Q. Separated?
A. Yes, I am.
Q. All right. Now, had you been going with Ernest?
A. No, I never went with Ernest.
Q. But you had been going with Wink?
A. Wink Walker, yes, I have went with Wink Walker.
Q. Right. And how long had you been knowing
page 98 } Wink Walker?
A. Going on two years.
Q. When Ernest came to your house—was it Ernest that came to the house or Wink Walker?
A. Ernest came to the house 11:30.
Q. Did he come in the house?
A. Ernest came into the house. I were in the living room and Ernest came into the house.
Q. What were you doing in the living room?
A. Looking at T. V.
Q. Anybody with you?
A. My sister and my two girls.
Q. Your two girls?
A. My two girls.
Q. You have two daughters?
A. Yes, I do.
Q. Your sister and your two daughters were with you and you were watching T. V.; this was around 11:30 P. M.?
A. 11:30 P. M.
Q. On November 20?
A. That is right.
Q. Is that right? And did Popeye and Wink go into the house with Ernest?
A. No, they didn't.
Q. Just Ernest came in?
A. Ernest came in by himself.
page 99 } Q. Asked you to go to Hobson?
A. That is right.
Q. So what did you do? You got in the car?

*Elsie Lee Sykes.*

A. I told him yes, I didn't have anything else to do, I would go for the ride.

Q. Where did you sit in the car?

A. In the front seat.

Q. You sat in the front seat?

A. Yes, I did.

Q. You went to Hobson, Virginia, in the front seat, with Wink Walker and Popeye in the back seat?

A. Yes, I did.

Q. Is that right?

A. That is correct.

Q. Had you ever been to Hobson before?

A. Several times.

Q. That is where Wink Walker lives, in Hobson, isn't it?

A. Yes, it is.

Q. And Popeye does, too?

A. Yes, he do.

Q. And you had been there before, hadn't you?

A. Yes, I had been there several times.

Q. Where does Annie live, by the way?

A. In Hobson, Virginia.

page 100 } Q. And Annie is a friend of yours?

A. Yes, she is.

Q. She is also a friend of Ernest Davis, isn't she?

A. That is right.

Q. Was Ernest sort of going with her?

A. That I don't know.

Q. Well, would you say that Ernest had been dating her?

A. They have been out several times. We all have been out together.

Q. You never had a date with Ernest, though?

A. No, I never had a date with Ernest.

Q. But Annie had?

A. Yes, she had.

Q. She was sort of his girl friend, maybe?

A. I guess so.

Q. All right. So you drove to Hobson, Virginia. How long did it take you to get there?

A. We got to Hobson at 12:00; 12:00 o'clock. He left my house at 11:30; we got to Hobson at 12:00 midnight.

Q. How did Ernest drive? All right?

A. He drives very nice.

Q. Had you ridden with him before?

A. Sure I have.

*Elsie Lee Sykes.*

Q. He always drives cautiously?
A. Yes, he has.
page 101 } Q. Never gave you any cause to worry?
A. No, he never has.
Q. Drove carefully as far as you knew?
A. Yes, he did.
Q. Did he do that on the night he drove to Hobson?
A. Going?
Q. That is right.
A. Yes, he did.
Q. And after you got to Hobson, where did you go first?
A. Where I go first?
Q. That is right.
A. Ernest dropped the two fellows off and I went to Annie's.
Q. Where did he drop the two fellows off?
A. Off to the house.
Q. To what house? One house or two houses?
A. He dropped Wink off and he dropped Popeye off.
Q. At the same place?
A. No. They don't live the same place.
Q. Separate houses?
A. Yes, separate houses.
Q. Then you went to Annie's house?
A. That is right.
Q. When you got to Annie's house, about what
page 102 } time was it?
A. Around 12:00.
Q. When you stopped out there, did you both go in?
A. No, Ernest didn't go in; I went in.
Q. You went in?
A. Yes, I did.
Q. You mean Ernest didn't even go in to see Annie?
A. Ernest didn't go in. I went in.
Q. All right. You went in and you stayed with Annie until what time did he come back to pick you up?
A. Now, that I don't know because I was asleep.
Q. You were asleep?
A. Yes, I was.
Q. You don't have any idea what time it was he brought you back?
A. No, I don't.
Q. Let me ask you this: Do your two daughters and your sister live with you?
A. I live—my daughters and I live with my sister.

*Elsie Lee Sykes.*

Q. You and your daughters live with your sister?
A. That is right.
Q. Is that right?
A. That is right.
Q. Do you remember clearly everything that happened that night? Are you a little vague about it? I want
page 103 } to give you an opportunity to tell this jury exactly the way it is. Do you remember clearly everything that you just told us?
A. Do I remember what happened?
Q. Well, the things that we just talked about; Ernest coming by your house—
A. Sure.
Q. —picking you up—
A. Sure.
Q. —taking you to Hobson, taking you to Annie's house?
A. Sure.
Q. Do you remember all that?
A. I remember he taken me to Annie's house but when he came back to pick me up I was asleep; I don't know when he came back.
Q. But you do remember all the rest of it clearly?
A. Yes, I do.
Q. When you got in the car to come back, who else was in the car?
A. Ernest in the car by himself.
Q. By himself?
A. Yes, he was.
Q. Right after leaving Hobson you went to sleep?
A. Yes, I did.
Q. Before you went to sleep, was he driving all
page 104 } right?
A. Yes, he was.
Q. As far as you know, he was driving cautiously?
A. He was driving perfect.
Q. Didn't give you any cause for alarm?
A. No, he didn't.
Q. Didn't tell you he was sleepy?
A. No, he didn't.
Q. Did he look all right?
A. He looked fine.
Q. He could talk all right?
A. Talked perfect.
Q. The next thing you knew, the accident happened?
A. That is right.

*Elsie Lee Sykes.*

Q. Is that right?
A. That is right.
Q. Now I ask you, Elsie, if it isn't true that on the night of November 20th you had some of your friends to come by your house to watch the late show on television?
A. November 20th?
Q. That is right, that Friday night.
A. (Pausing).
Q. Can you remember that?
A. (Pausing).
Q. Did you see the late show on television that night?
A. I saw some of it.
page 105 } Q. Didn't you have some friends come by your house to watch television that night?
A. (Witness pausing).
Q. Not a party but just to come by and watch television?
A. (Pausing) Yes, I did.
Q. And weren't Wink Walker and Poyeye by there, watching television with you?
A. Wink and Popeye were watching television, yes.
Q. At your house?
A. Yes.
Q. All right. Who left first? Did Wink leave first?
A. We all left together.
Q. All left together?
A. That is right.
Q. When you left there, what time was it?
A. We left my house at 11:30.
Q. 11:30?
A. That is right.
Q. Well now, Ernest wasn't there, was he?
A. Ernest came by there.
Q. He came by there?
A. Yes, he did.
Q. And when Ernest came by the house, that is
page 106 } when you and Wink and Popeye left the house?
A. Ernest asked me do I like to go for a ride, take some friends home. I said I wouldn't mind for I didn't have anything else to do.
Q. All right. Let me see if I understand you. You and Popeye and Wink were watching television?
A. And my sister and my two—
Q. Your daughters?
A. Yes.
Q. And your sister. And Ernest came by?

*Elsie Lee Sykes.*

A. Yes, because Ernest always takes him home.
Q. Always takes who home?
A. Always takes Popeye and Wink home.
Q. You were with Popeye and Wink that night?
A. I was. We all was watching television.
Q. So he came by and all of you got in the car and you drove to Hobson?
A. That is right.
Q. And you got in the back seat with—
A. I got in the front.
Q. —with Wink, didn't you?
A. No, I didn't.
Q. You got in the front seat?
A. I got into the front seat with Ernest?

page 107 } Q. You mean Wink was the man you had been dating but he got in the back seat with Popeye and you got up front?

A. Yes, I did.
Q. And then you went to Hobson?
A. Yes.
Q. And then you went by Annie's house?
A. Yes.
Q. And you say that—do you know what time that was, by the way?
A. When?
Q. That you went by Annie's house.
A. We got by Annie's house around 12:00.
Q. Around 12:00 o'clock?
A. Yes, he did.
Q. You say that even though Ernest had been seeing Annie, he took you by Annie's house?
A. And told me wait until he come back.
Q. All right. And just left you there until he came back to get you?
A. Yes, he did.
Q. Is that right?
A. That is correct.
Q. Well, it was really Wink who wanted to go to Hobson because he had to go home, wasn't it?
A. They both have to go home; also Popeye.

page 108 } Q. Wink and Popeye wanted to go home?
A. Yes, they did.
Q. Don't you know that they asked Ernest to take them home?

A. Beg pardon?

*Elsie Lee Sykes.*

Q. Didn't they ask Ernest to take them home?
A. Ernest always takes them home. Whenever they comes down, Ernest usually takes them home.
Q. Takes them home, is that right?
A. Yes, he did.
Q. Do you know whether Wink went over to Ernest's house to get him and tell him he was ready to come home?
A. No, he didn't.
Q. He did not?
A. No, he didn't.
Q. Ernest just showed up around there, is that right?
A. Yes, he did.
Q. You don't know what Ernest did then from the time he left you at midnight until he came back to Annie's house to pick you up?
A. No, I don't.
Q. You don't know what he did?
A. No, I don't.
page 109 } Q. He had already dropped Wink off?
A. Yes, correct.
Q. He had already dropped Popeye off?
A. That is right.
Q. And he dropped you off?
A. That is right.
Q. And how big is Hobson?
A. I don't know how large Hobson.
Q. How many houses is Hobson?
A. I couldn't say how many houses is Hobson, I don't know.
Q. Let me ask you this, Elsie: Are you feeling any better now than you were?
A. Not too much, if I can't sleep nights.
Q. Can't sleep?
A. No, I can't.
Q. Are you as sore as you were in the very beginning?
A. In my chest and my side and my mouth. I can't lie on the right side of my face.
Q. And how long have you been up, walking around?
A. The last time I came out of the hospital.
Q. That is when you started walking around?
A. Yes.
Q. Well, you are not as sore now as you were at first?
A. No. No, I am not as sore as I were at first
page 110 } but I am sore.
Q. You are still sore?

*Elsie Lee Sykes.*

A. Yes, I am.
Q. Still have the headaches?
A. Yes, I am.
Q. Still sore in the chest?
A. Yes, I am.
Q. Your ribs hurt you?
A. Yes, they do.
Q. What side?
A. My left side.
Q. Are you able to take care of yourself?
A. No, I am not.
Q. Who takes care of you?
A. Well, whatever people gives me.
Q. I mean can you dress yourself?
A. Sure, I can dress myself.
Q. Feed yourself. All right. That is all. Thank you, Elsie. You can answer Mr. Winston.

By Mr. Winston:
Q. Elsie, I only have a couple of questions for you. I believe you said you didn't recall the time or the approximate time at which you came out of Annie's house to go back to Portsmouth, is that right?
A. Correct.
page 111 } Q. After getting in the front seat of the car and driving off from Annie's house, you say you then went to sleep?
A. Yes, I did.
Q. The last thing you remember before going to sleep was the car on its way back to Portsmouth?
A. Yes.
Q. Were you coming back to Portsmouth—
A. Yes.
Q. —as far as you knew then?
A. Yes, we was.
Q. Do you recall approaching the Churchland Bridge at all?
A. No, I don't.
Q. The next thing you remember is that you woke up in the hospital?
A. Correct.

Mr. Winston: All right, thank you.
Mr. Bangel: That is all. Come down.

page 112 } ANNIE BRINKLEY,

called as a witness on behalf of the plaintiff, and having been first duly sworn, testified as follows:

Examined By Mr. Bangel:

Q. State your name, please.

A. My name is Annie Brinkley.

Q. You will have to talk a little louder.

A. Annie Brinkley.

Q. Where do you live?

A. Hobson, Virginia.

Q. Directing your attention to November 21 of last year, when Elsie Sykes was involved in an automobile collision, did you see her on that occasion, that evening before the accident?

A. Yes, I did.

Q. When did you first see her that night?

A. Well, I operate a store and that night I—after closing the store, I had appointment at the beauty parlor. So I goes—it is in Suffolk—so I drives from Hobson to Suffolk and get my hair done and afterwards I come back home around, close to midnight, and that is when I seen her.

Q. Where did you see her? At your home?

A. Yes.

Q. Who brought her there?

A. Well, I seen the car, Davis—Ernest's car.

page 113 } I didn't see him, I seen the car.

Q. Did anyone else come in the house besides—

A. No.

Q. —Elsie?

A. No one but Elsie.

Q. How long did she remain there?

A. Well, since I was up she—we just got to talking; she said that they were coming back after her, and we got to talking and—and didn't anyone come back for her. So she stayed with me until it was around near 5:00 o'clock that morning and—when she left, came for her.

Q. Who came for her then?

A. Davis came for her.

Q. Did they leave then? You said it was around 5:00 o'clock?

A. Yes; yes.

Q. What, if anything, did you and Elsie do between 12:00 o'clock and 5:00 o'clock?

A. Well, it was nothing to do but just talk, until we both just dozed off, went to sleep. By working, I was pretty tired and then I had been to the beauty parlor.

*Annie Brinkley.*

Q. About what time was that? Do you have any idea?
A. That I went to the beauty parlor?
Q. No, that you all went to sleep.
A. Oh, I guess around 1:00 or a little after or
page 114 } something like that.
Q. Had Ernest come back for her before then?
A. We didn't—we hadn't heard him; no one come, no.
Q. You said it was around 5:00 o'clock that she left with Ernest?
A. Yes. It was something like that because after she left, it was near time for me to open the store.

Mr. Bangel: You may inquire.

## CROSS EXAMINATION.

By Mr. Rixey:
Q. What time did she come to your house?
A. Well, it was near midnight because I had been to the beauty parlor. As I said, I operate a store. After closing the store—
Q. I understand that. Tell me who brought her by there.
A. Well, Ernest's car. I didn't see anyone but Elsie. She came in the house.
Q. A few minutes ago you said "they." Was somebody in the car with him?
A. Well, she said it was. I don't know who they
page 115 } were.
Q. Who did she say were in the car?
A. She didn't say. I didn't ask; I don't know.
Q. She said there was somebody else besides Ernest?
A. Well, she said "they"; I didn't ask.
Q. She said they dropped her off?
A. Yes.
Q. Is that right?
A. Yes.
Q. Then she stayed there with you?
A. Yes.
Q. Did you see Ernest that night at all?
A. No.
Q. Didn't talk to him?
A. No.
Q. But you know him, don't you?

*Annie Brinkley.*

A. Oh, yes.
Q. What time was it he came back, picked her up?
A. It was near 5:00.
Q. How did you know he was there?
A. How did I know? Because someone was blowing and they knocked on the door. And by expecting, whenever—I mean myself expect someone, then I look forward for to see him.
Q. You heard the horn blowing, somebody knocked on the door?
page 116 } A. Yes.
Q. Did you go down to the door?
A. Well, I was already down. I had never went up, see.
Q. Did you open the door?
A. Pardon?
Q. Did you open the door?
A. Yes; yes.
Q. Then you did see Ernest?
A. No, I didn't see him.
Q. Who knocked on the door?
A. Well, when he—opened the door when—when—I did see Ernest because he is the one came back and knocked on the door.
Q. So you did see Ernest?
A. Yes; yes.
Q. How long did you talk to him?
A. I was simply speaking—I didn't talk with him because I wasn't dressed, but what I was speaking when I said I didn't see him, that was the night that he brought her there, that the car came by, I didn't see him.
Q. You now say you did see him when he came back to get her?
A. Yes. I opened the door.
Q. Then she went on, got in the car?
page 117 } A. That is right.
Q. "She" is Elsie, is that right?
A. That is right.
Q. How big a place is Hobson?
A. Well, approximately I do not know but it is not a very large place.
Q. How many houses in it?
A. I don't know that, either.
Q. Is it a crossroads?
A. Yes—no, no, no crossroads, just a straight highway.

Q. Just a straight highway?
A. Yes.
Q. Do you live near Wink Walker?
A. No.
Q. How far do you live from Wink Walker?
A. Well, that is another neighborhood. They call that—I live—anyway, they call where he lives, they call it down the woods. Anyway, it is a little different section.
Q. How about Popeye? Do you know him?
A. Yes.
Q. You live near Popeye?
A. No, I don't live near him. I mean I—up in the same village.

page 118 } Q. If you leave Portsmouth and you go to Hobson, whose house do you come to first, your house or Popeye's house or Wink Walker's house?

A. Well, according to what way they come. If they comes in through Route 17 and turns off—
Q. That is going by way of Churchland?
A. That is right.
Q. If they come that way, where do they come first?
A. Coming up to Hobson, they would turn off to go to Wink Walker's house.
Q. First?
A. Yes.
Q. Then where would they go?
A. They would have to come up about so many blocks, half a mile, to where I live.
Q. How about Popeye's house?
A. Well, he lives further down.
Q. He lives on down further?
A. That is right.
Q. First is Wink Walker's house, then your house, and then Popeye's house?
A. That is further down, yes.

Mr. Rixey: That is all I want to know.
Mr. Bangel: That is all. Thank you.

page 119 } MARGARET JONES,
recalled, testified further as follows:

Examined by Mr. Bangel:
Q. Mrs. Jones, you were on the witness stand just prior to the lunch recess and I believe I had asked you if you knew

the general reputation of Elsie Lee Sykes in the community here of Portsmouth.

Mr. Rixey: If Your Honor please, I object to the question again; just as before, I don't think the reputation of Elsie Sykes is in question. I have not suggested to Elsie that I intended to contradict her. I don't expect to try to prove that her reputation is bad, don't have any idea that it is, and I would object to this line of questioning.

Mr. Winston: We join in the objection for the record, sir.

Mr. Bangel: If Your Honor please, of course I didn't quite finish my question. I was going to end up with: "as to truth and veracity," which I didn't get a chance to add to the question.

The Court: I think the question as to that would be proper. I overrule the objection.

Mr. Rixey: And we note exception.

Mr. Winston: Exception.

page 120 } By Mr. Bangel:

Q. Do you know it, Mrs. Jones, her general reputation as to truth and—

A. Your question, well, yes. In operating my home I usually investigated anyone that came in because they had full responsibility because, as I stated before, I am not there. And having Mama there I felt that certainly I wanted to know who I was leaving my home and my mother with.

Q. And what is her general reputationu as to truth and veracity?

A. Very good.

Q. Mrs. Jones, I will ask you to look at Elsie sitting here at the counsel table, and referring specifically to the right side of her face, or to your left—her right side of her face, and ask you if that was the normal appearance of her face prior to this automobile collision.

A. No, sir. She was—she had no swelling there. And she was a very neat and a very nice looking girl.

Q. And did she have any trouble, difficulty in speaking, prior to the collision?

A. None whatsoever.

Q. Does she have any now?

A. Yes, she does.

Mr. Bangel: All right. Answer this gentleman.

*Margaret Jones.*

page 121 } CROSS EXAMINATION.

By Mr. Rixey:

Q. Mrs. Jones, how many days a week did Elsie work for you?

A. About seven; seven days in a week.

Q. And what were her hours there?

A. Well, she worked from—I would usually pick her up about 8:30 or 9:00 o'clock in the morning; until—had my dinner and it is questionable as to what time we have our dinner at night because of the business that we are in, and we eat some nights at 6:30 or 7:00 and if we have an appointment, I would go my way, Mr. Jones would go his, and she would stay with my mother.

Q. She would get off, say, from 7:30 on to what?

A. No. Some nights she did not get off, she stayed on for me.

Q. Stayed on all the time, sometimes?

A. Sometimes.

Q. The normal night, what time would she get off?

A. The normal night?

Q. Yes, ma'am.

A. Well, that would be hard for me to say because usually, I mean an appointment sometimes we might get home at 9:00 o'clock and, again, we might go out socially, be-
page 122 } cause everybody is entitled to a little leisure time. And we would—sometimes be later; sometimes it might be 11:00 or 12:00. Sometimes she might leave at 9:00 or 9:30. But I knew that she was always there when I needed her.

Q. Let me ask you this: Was it your practice to pick her up in the morning?

A. Usually; most of the time I did.

Q. Do you remember the day before this accident happened?

A. Yes, I do.

Q. Do you recall whether you picked her up that morning?

A. Well now, the accident I think was before Thanksgiving.

Q. On the early morning of November 21st; it was a Saturday morning.

A. That is right; and the Friday morning before, you are asking me, which was November 20th?

Q. Yes, ma'am. Would you happen to remember?

A. I am sorry, I can't, because I have picked her up some

mornings, and some mornings I didn't; most of the time I did.

Q. Was she prompt in coming to work when you didn't pick her up?

A. Very; she was very prompt.

page 123 } Q. Can you recall whether the morning before the accident she was late coming to work and didn't get there until around 11:00 o'clock?

A. No, I can't. Get there at 11:00 o'clock on the morning of November 20th?

Q. Yes, ma'am, Friday morning.

A. I am sorry, I can't.

Q. Mrs. Jones, can you tell me—do you have any children?

A. Yes, I do.

Q. And do they stay in the house when you are not there and your husband is not there and Elsie is not there, but your mother is?

A. Do my children stay in the house?

Q. Yes, ma'am. Do they look after your mother?

A. No, sir.

Q. In other words, it is either Elsie or you or no one?

A. That is right. My children were teen-agers and then they married and they work and they have had their own problems. And my problems are my problems. Of course, they are nice children.

Q. I am sure they are. Can you tell me what time you usually go to work?

A. I go to work between 9:00 and 9:30.

page 124 } Q. Would you say that the morning before this accident; that is, Friday morning, was any exception?

A. I told you I couldn't remember the morning of November 20th.

Q. Do you generally go to work about the same time every morning?

A. Usually, unless I am waiting for a phone call or appointment of some thing, I mean nearby where I can swing from my house over. It all depends.

Q. But you wouldn't go to work and leave your mother there alone, without Elsie, would you?

A. No, sir. I would leave someone in the house, for sure.

Q. Well, if Elsie was as late as 11:00 o'clock coming to work on the morning before the accident—that is Friday morning—is it reasonable to assume that you would remember that, if that happened?

A. I told you I don't remember.

Mr. Bangel: If Your Honor please, she testified three times she doesn't remember.

A. I don't remember what happened on November 20th. In general, I remember her duties, naturally I do; I paid her, and I remember the times that my duties—I mean I don't know that anybody in here could remember exactly the minute and the time and all. But I know I depended on her.

page 125 } By Mr. Rixey:

Q. To be with your mother?

A. Yes, sir, and to take care of my home.

Q. Yes, ma'am. Can you recall what time Elsie left your house the night before the accident?

A. Well, if I could—if I had my date book here and I could—because I don't want to tell you anything wrong.

Q. I know.

A. I—the night of November 20th I couldn't tell you what I did that night, whether I came in at 6:00 o'clock, 8:00 o'clock or 10:00 o'clock.

Q. Using the morning that Elsie got hurt as a reference point, you can't recall what happened the night before? No reason why you should.

A. Only I was getting ready for Thanksgiving, I remember that. And I thought "Of all times for my right arm to be gone is now."

Q. Yes, ma'am. Thank you very much, Mrs. Jones; I appreciate it.

Mr. Winston: No questions.

Mr. Bangel: That is all. Mr. Jones, please.

page 126 } CECIL JONES,

called as a witness on behalf of the plaintiff, and having been first duly sworn, testified as follows:

Examined by Mr. Bangel:

Q. State your name, please, sir.

A. Name is Cecil Jones.

Q. Mr. Jones, where do you live, sir?

A. I live at 208 Norman Road.

Q. And what type of business are you engaged in, Mr. Jones?

*Cecil Jones.*

A. Engaged in real estate business.

Q. Do you know Elsie Lee Sykes, the plaintiff in this case?

A. Certainly do.

Q. How long have you known her?

A. About 15 years, I would say; close to that.

Q. Do you know her general reputation in the community for truth and veracity?

Mr. Rixey: If Your Honor please, my same objection.

Mr. Winston: I join in as before.

Mr. Rixey: I don't know how long we can go on with character witnesses. I suppose it would go on *ad infinitum,* just keep putting them on. I certainly do object.

The Court: I overrule the objection.

page 127 } Mr. Rixey: I note an exception.

Mr. Winston: Exception.

Mr. Bangel: You may answer, sir.

A. I have known Elsie for 15 years and known her to be a very high type girl. Had we not known that, we would never had her in our home. Of course, responsibilities that she had, plus the fact Mrs. Jones and myself are out a lot of times, out during the day, and of course she is left there with everything that we own.

Q. What type of work did Elsie do for you and Mrs. Jones?

A. Well, she did general housework. She did the cooking and also she looked after Margarets' mother, who has been ill.

Q. By "Margaret," you are referring to—

A. My wife. Excuse me. My wife's mother, who has lived with us for 30 years, and the last few years she hasn't been at all well and Elsie, in addition to being a servant, was more or less a practical nurse for her.

Mr. Bangel: You may inquire.

CROSS EXAMINATION.

By Mr. Rixey:

Q. Would you say that Elsie was a fairly in-

page 128 } telligent girl, Mr. Jones?

A. Very intelligent girl; receives phone calls for me often for my business reasons. And I have had a lot of favorable comment from our clients that call me during the day.

Q. Does she handle figures all right as far as you know?

A. Yes, sir, handles figures. She writes very legible and all the notes that I receive, we get home in the evening, are there and I understand them all.

Q. Can you recall the day before the accident; that is, Friday, the 20th; would you happen to know what time Elsie came to work that morning?

A. I would say the usual time, about 9:30 to 10:00 o'clock. I usually picked her up on—I don't recall just the hour that she came to work. She was usually—she was ready when I would go to pick her up.

Q. You and Mrs. Jones go to work together?

A. Well, at different times; depends upon our appointments.

Q. Can you recall what time, if you remember, Elsie left your house the night before the accident?

A. I would say after we have our evening meal. She was there usually around, oh, until 7:00, 7:30.

Mr. Rixey: Thank you very much.

page 129 } Mr. Bangel: Thank you, Mr. Jones.

Mr. Bangel: If Your Honor please, I would like to recall the defendant Patterson for one further question and that will complete our case.

Mr. Winston: You are calling him as an adverse witness?

Mr. Bangel: Adverse witness.

HANSFORD BUREAN PATTERSON, JR.,
recalled for further testimony as an adverse witness, as follows:

Examined By Mr. Bangel:

Q. Mr. Patterson, you testified previously that you saw the vehicle of the defendant Davis sometime prior to the impact actually occurring?

A. That is right.

Q. Would you please give us an estimate of the speed he was traveling at the time of the impact as he was coming up the bridge?

Mr. Rixey: If Your Honor please, I think he ought to ask him if he knows how fast he was going.

page 130 } By Mr. Bangel:
Q. If you can.

Mr. Rixey: I don't want him to guess.

Mr. Bangel: It is going to be an approximation quite obviously, when you are dealing with speeds; but if he is in a position to state what his opinion of the speed was, I believe it is certainly proper.

The Court: I think he has a right to answer it.

Mr. Rixey: We note an exception to the way in which the question has been put.

Mr. Bangel: Let me rephrase the question and tell me, Mr. Rixey, if you have any objection to this one.

By Mr. Bangel:

Q. Mr. Patterson, did you see the Davis vehicle sufficiently prior to the impact actually occurring, and from seeing it are you able to give your opinion as to the speed he was traveling?

A. I can give you approximately what I think.

Q. All right; yes, sir. Would you please do that, sir?

A. I would say between 40 and 50.

Q. What is the speed limit there, sir?

A. Well, on one side of the bridge it is 35 and on
page 131 } the other side it is 40.

Q. It does not exceed 40, does it—

A. No.

Q. —the limit?

A. That is right.

Mr. Bangel: That is all.

## CROSS EXAMINATION.

By Mr. Rixey:

Q. Mr. Patterson, do I understand that you first saw this car when it was halfway down the bridge?

A. Approximately about halfway.

Q. And coming directly towards you?

A. When I—

*A*. That is in the left lane?

A. That is right, when I first saw it.

Q. And it was in its proper lane?

A. A-hum.

*Hansford Burean Patterson, Jr.*

Q. And there wasn't any reason for you to take any particular notice of that car at that time, was there?
A. No, it wasn't.
Q. Other than it was just another car on the highway?
A. That is right.
Q. And did you take any particular notice of it?
page 132 } A. Not until it came over.
Q. Well, did you happen to take any particular notice of the speed of that car until it came over onto your side of the road?
A. No, I didn't. I didn't—I couldn't really say how fast he was going. I mean, I just have to guess.
Q. You really don't know how fast he was going?
A. No, I actually don't know.
Q. Are you guessing?
A. I am giving you what I think. I mean what it looked like to me.
Q. Well, the car didn't attract your particular attention until it started coming over towards you?
A. On my side, that is right.
Q. Then it was five to six hundred feet away?
A. I would say that.
Q. Headlights blaring?
A. Yes.
Q. Your headlights were on?
A. Yes.
Q. And you went into the motions of blowing your horn and slapping on your brakes?
A. Yes.
Q. Is that right?
A. That is right.
page 133 } Q. Don't you find it difficult to tell the speed of an oncoming vehicle?
A. I do.
Q. Particularly in view of the fact that you are going downgrade and the other vehicle was coming upgrade?
A. That is right.
Q. All right. Well now, in view of those particular items, is it just your opinion as to how fast he was going that you have given us?
A. Yes, sir.
Q. Are you guessing?
A. It is my opinion.
Q. Your opinion?
A. A-hum.

*Hansford Burean Patterson, Jr.*

Mr. Rixey: Your Honor, I ask for it to be stricken. A car coming directly towards him, five hundred, six hundred feet away, and he says he couldn't possibly know, just his opinion as to what it is. Opinion evidence is certainly not due to carry any weight.

The Court: It depends on your definition of opinion. I think the evidence is admissible for what it is worth under the circumstances. I overrule your objection.

Mr. Rixey: All right. We note an exception.

page 134 } Mr. Bangel: That is all, sir. I didn't know if Mr. Rixey had any further questions.

Mr. Rixey: No.

Mr. Bangel: That is the plaintiff's case.

Mr. Rixey: We would like to have a motion, if Your Honor please.

Mr. Winston: We also, Your Honor.

(In the Judge's chambers, in the absence of the jury, Mr. Winston on behalf of the defendants Shell Oil Company and Hansford Burean Patterson, Jr., moved that the plaintiff's evidence be struck and summary judgment be entered up in favor of the defendants Shell Oil Company and Patterson on the ground that there was no evidence that these defendants were in any way negligent or legally responsible for the collision, which motion was sustained by the Court and exception taken by Mr. Bangel, on behalf of the plaintiff. Mr. Winston departed, with his client. Mr. Rixey then moved the Court on behalf of the defendant Ernest Eugene Davis to strike the plaintiff's evidence on the grounds that a case had not been made out of gross negligence as a matter of law and that the question should not be submitted

page 135 } to the jury, and on the further ground that the plaintiff was guilty of contributory negligence as a matter of law or, in the alternative, if not guilty of contributory negligence as a matter of law she had certainly assumed any risks or dangers inherent in this particular journey, and for those reasons the plaintiff could not recover. After argument by counsel, the Court overruled the motion and exception was taken by Mr. Rixey on behalf of the defendant,

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page 136 }

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ERNEST EUGENE DAVIS,
the defendant, recalled, testified further in his own behalf as follows:

Examined by Mr. Rixey:
Q. You are Ernest Eugene Davis?
A. That is right, sir.
Q. And you have already testified in this case once, haven't you?
A. Yes, sir.
Q. All right. Now, I want you to think back to the night before this accident happened and I ask you again what time you got home.

Mr. Bangel: If Your Honor please, it is not proper to go over this again.

Mr. Rixey: Your Honor, I would like just
page 137 } briefly to have him cover his series of events.

The Court: I will let you.

Mr. Bangel: We save the point, sir, as being repetitious.

By Mr. Rixey:
Q. Be brief, Ernest. What time did you get home that night, Friday night?
A. About 10:30 or 11:00 o'clock.
Q. And when you got home what did you do, after you got home?
A. I started eating and looking at T. V.
Q. And what time did you go to bed?
A. Around about 12:30 or a quarter to 1:00.
Q. That was in the morning then?
A. That is right.
Q. Had you been to Elsie's house?
A. No, I hadn't.
Q. Were you at Elsie's house around midnight that night?
A. No.

Mr. Bangel: I object to these questions as being leading.
The Court: I sustain the objection.

*Ernest Eugene Davis.*

By Mr. Rixey:

Q. All right. Will you state whether or not you
page 138 } saw Elsie before you went to bed that night at
1:30?

A. No, I hadn't.

Q. Will you state whether or not you had seen Wink Walker or Popeye that night?

A. No.

Q. How long did you sleep, Ernest?

Mr. Bangel: I would like to renew my objection made previously. This had all been gone over by this witness. He is just going over it again.

The Court: I am going to overrule the objection. I think he has a right to put on his case in his own order.

Mr. Bangel: All right, sir. We save the point.

By Mr. Rixey:

Q. What time did you go to sleep?

A. About a quarter to 1:00, something like that.

Q. How long did you sleep?

A. Around about 2:30, I guess.

Q. And what woke you up?

A. Walker.

Q. Did you leave the house with Walker then?

A. Yes, I did.

Q. Where did you and Walker go?

A. By Elsie's house.

page 139 } Q. What time did you get by Elsie's house?

A. I guess it was close around 3:00, I guess.

Q. Before then—did you see Elsie that morning when you got around to her house?

A. Before then?

Q. No, when you got around there did you see her?

A. Yes, when she come out.

Q. Did you go in her house?

A. No, I didn't.

Q. Had you seen her before that morning, or the night before?

A. No, I hadn't.

Q. Do you go with or have you ever dated or gone with Elsie?

A. No, I haven't.

Q. You have heard the testimony here when Elsie took the stand and testified, did you?

*Ernest Eugene Davis.*

A. Yes, sir.

Q. Did you hear her say that you asked her if she wanted to go to Hobson?

A. Yes, I heard that.

Q. Did you ask her if she wanted to go to Hobson?

Mr. Bangel: The same objection; leading.

Mr. Rixey: All right.

page 140 } By Mr. Rixey:

Q. Did you make the statement to Elsie that she testified you made to her?

Mr. Bangel: The same objection.

Mr. Rixey: That is not leading. I am not asking for any particular answer.

Mr. Bangel: You asked him "Did you," a yes or no answer, which is certainly leading. Mr. Rixey can ask him "What, if anything" but he certainly can't suggest the statement.

Mr. Rixey: I am not suggesting the answer.

The Court: I think that is proper. She testified to a certain state of facts. His question is whether his version is the same.

Mr. Bangel: We save the point.

By Mr. Rixey:

Q. Did you make that statement to her, ask her that question?

A. Repeat it again.

Q. Did you ask Elsie if she wanted to go to Hobson with you or did you ask her to go with you?

A. You mean did I ask her to go with me?

Q. That is right, to Hobson that night.

A. Did she want to go?

Q. That is right.

page 141 } A. Neither one of them.

Q. Neither one of them?

A. No.

Q. All right. Now, on the way to Hobson where did Elsie sit in the car?

A. In the back.

Q. Who was she with?

A. Walker.

*Ernest Eugene Davis.*

Q. When you got to Hobson, whose house did you go to first?
A. Popeye's.
Q. Which is the first house that you come to, Popeye's house or Wink Walker's house?
A. Walker's.
Q. The first one. Which was the first one you went to?
A. To Popeye's.
Q. And after you left Popeye's house, whose house did you go to?
A. I mean I didn't go up to the house, I just put him off at the path in the road.
Q. You didn't go up to Popeye's house?
A. Oh, Popeye's, yes, I went up to his house.
Q. How close did you let him off, to his house?
A. Right at his house.
page 142 } Q. Right at his house. When you left Popeye's house, whose house did you go to or where did you go next?
A. I just dropped Walker off at the road.
Q. Dropped Walker off at the road?
A. That is right.
Q. Between the time you dropped Popeye off and the time you dropped Walker off, did you go to anybody else's house?
A. No, I didn't.
Q. Did you stop in front of anybody else's house?
A. No.
Q. Did you go in anybody else's house?
A. No, I didn't.
Q. Did you drive by Annie's house?
A. On the way down there, yes.
Q. You drove by?
A. (The witness nodded).
Q. Did you stop?
A. No.
Q. And when you drove by Annie's house, who was in the car with you?
A. All four of us.
Q. All four of you?
A. Yes.
Q. Did you see Annie Brinkley that morning?
page 143 } A. No, I didn't.
Q. Did you see her the night before?
A. (Witness pausing) No.
Q. Did you know Annie Brinkley very well at that time?

*Ernest Eugene Davis.*

A. Yes, I did.
Q. Had you been dating her?
A. Yes, I had.

Mr. Bangel: I object to leading questions.

By Mr. Rixey:
Q. Can you tell me when you last saw Annie Brinkley? When was the last time you saw her?
A. What do you mean? When?
Q. From right now, when was the last time you saw her?
A. Last Sunday.
Q. Last Sunday night?
A. Yes, sir.
Q. And will you state whether or not you and Annie had a falling out last Sunday?
A. Yes, we did.
Q. Will you state whether you had been going with her before then?
A. Was I going with her before—
Q. Before last Sunday.
page 144 } A. Yes, I was.
Q. Is it your intention to go with her now?

Mr. Bangel: I object to that, if Your Honor please.
Mr. Rixey: It has a bearing on the testimony, Your Honor. I think the jury has a right to consider it.

(The Court indicated affirmatively.)

By Mr. Rixey:
Q. Is it your intention to go with her any more?
A. If she would have me.
Q. What was her feeling on the matter last Sunday?
A. Oh, just—

Mr. Bangel: I don't see how this could be material. I renew my objection.
The Court: I overrule it.
Mr. Bangel: I save the point, sir.

By Mr. Rixey:
Q. What was Annie's feeling last Sunday about you and her keeping on going together? Just tell us briefly.
A. It was just something small, that is all.
Q. Just something what?

*Ernest Eugene Davis.*

A. Small.
Q. Something small?
A. Yes.

page 145 } Mr. Rixey: All right, Ernest. Answer these gentlemen. They are going to ask you some questions.

CROSS EXAMINATION.

By Mr. Bangel:
Q. What time did you go to work that Friday morning?
A. 10:00 o'clock.
Q. What time did you wake up that morning?
A. I will say round about 8:00.
Q. Around 8:00 o'clock?
A. That is right.
Q. And you got off work at what time?
A. 9:00 o'clock.
Q. What barber shop did you go to when you got off work?
A. Which barber shop did I go to?
Q. Yes.
A. I didn't go to any barber shop.
Q. You deny going to a barber shop when you got off work?
A. (Witness pausing) Yes, I do.
Q. Do you know a fellow by the name of Mack that lives in Norcom Park?
page 146 } A. Yes, I do.
Q. When did you go to his house that night?
A. I didn't go to Mack's house.
Q. You did not go to Mack's house that night?
A. No, I didn't. I went in Howard Park that night.

Mr. Rixey: Where?

By Mr. Bangel:
Q. Where?
A. In Howard Park.
Q. You went over to Howard Park?
A. Yes.
Q. You didn't go to Mack's house in Norcom Park?
A. No, I didn't.
Q. Where did you go in Howard Park?
A. It was a club giving a party.

*Ernest Eugene Davis.*

Q. You went to a party?
A. That is right.
Q. Did you have anything to drink?
A. I had a few beers.
Q. You had some beer?
A. That is right.
Q. How many beers did you have?
A. Three.

Mr. Rixey: If Your Honor please—all right.

page 147 } By Mr. Bangel:
Q. What?
A. I had three.
Q. Where did you have that beer?
A. In a house.
Q. What house?
A. It is an apartment, I couldn't say which house it was.
Q. Whose house?
A. I do not know.
Q. You just walked in, had three beers?
A. No, I didn't just walk in.
Q. How did you get there? What made you walk into this house?
A. Because I knows the party there.
Q. What boy do you know there?
A. It was a ladies' club giving a party.
Q. You said you "knowed" a boy there. What boy did you know?
A. I didn't say I knowed no boy.
Q. You didn't say that?
A. No. I said it was a club.
Q. What club was it?
A. It is "Trinkerlets."
Q. Who did you know there?
page 148 } A. I knowed most all of them.
Q. Name some of them.
A. Rosa Lloyd.
Q. Is that whom you went to see?
A. That was the club was giving the party; just a selling party.
Q. Who invited you there?
A. Just say some of us come around and buy something from her, that is all.
Q. Buy what?

*Ernest Eugene Davis.*

A. Food.
Q. Beer?
A. Beer, that is right.
Q. And that was Rosa Lloyd?
A. That is right.
Q. Where does she live?
A. Norcom Park.
Q. Norcom Park?
A. Yes, she do.
Q. So you went to Norcom Park?
A. The party wasn't at her house.
Q. Where was the party?
A. In Howard Park.
Q. What address in Howard Park?
A. I couldn't tell you the exact number of the
page 149 } park.
Q. You don't know where it was?
A. I don't know the number of the house.
Q. Did anyone go with you?
A. Yes, another fellow.
Q. Who went with you?
A. A boy named Harvey Shearer. (Name not spelled)
Q. Where does Harvey live?
A. On London—I mean County Street.
Q. What time did you go to Howard Park?
A. After I got off work.
Q. What time was it that you got there? Where did you meet Harvey?
A. He had my car and he come around there and picked me up.
Q. Why didn't you tell us about going over there before?
A. Because you didn't ask me.

Mr. Rixey: I object to arguing with the witness.
The Court: I sustain the objection.

By Mr. Bangel:
Q. All right, sir. So you went over there with Harvey?
A. That is right.
Q. And what time did you get there?
A. I would say about ten minutes past nine.
page 150 } Q. How long did you stay there?
A. Oh, about 45 minutes, I think.
Q. Where did you go from there?
A. I carried him home; then I went home.

*Ernest Eugene Davis.*

Q. Did you go to Jake's place that night?
A. Jake's?
Q. Yes.
A. No, I didn't.
Q. You did not?
A. No.
Q. Do you know where Jake's Place is located?
A. Yes, I know.
Q. Are you familiar with the place?
A. Yes, I am.
Q. And you deny going there?
A. That is right.
Q. Is Rosa Lloyd related to Mack?
A. Yes, she is. That is his wife.
Q. Oh, I see. So when I asked you about Mack Lloyd before, you stated you didn't go over Mack's house you went to see Rosa, is that right?
A. I went to the party that her club was giving.
Q. Do you know where Mack lives?
A. Yes, I know.
Q. Where does he live?
page 151 } A. On Ash Street in Norcom Park.

Mr. Bangel: That is all.

Mr. Rixey: Your Honor, we have no more evidence. That is our case. We rest.
The Court: Have you gentlemen finished?
Mr. Bangel: We have no further evidence.
The Court: Gentlemen, we will take about a 20 minutes' recess for instructions.

(In the Judge's chambers, in the absence of the jury, Mr. Rixey renewed the motion previously made to strike the plaintiff's evidence, on the grounds and for the reasons previously stated, which motion was overruled and exception duly noted by counsel for the defendant, after which the Court took up the instructions, during which the following occurred:)

The Court: Let this go in the record, then. The defendant is given the choice between Instructions B and C—
Mr. Rixey: —but refused—
The Court: —but the Court refused to give both and the defendant has elected to take Instruction C under those

circumstances and excepts to the action of the
page 152 } Court.

Mr. Rixey: Let the record further show that the Court amended Instruction B on his own motion and then would not grant both B and C, it being the defendant's position that the instructions are separate principles.

(In the courtroom, prior to the closing argument by counsel to the jury, the Court read the instructions, exceptions to which had been noted by Mr. Rixey previously as follows:)

Mr. Rixey: The defendant excepts to the Court's granting any instructions for the plaintiff, on the grounds that the plaintiff has not proved gross negligence by the defendant, and on the further grounds that the plaintiff was guilty of contributory negligence as a matter of law; and on the further ground that she assumed the risk and as a matter of law is not entitled to recover.

The defendant specifically objects to the Court's granting Instruction 2, on the grounds that the instruction is contrary to the law and the evidence and takes away from the jury the question of contributory negligence. The defendant submits that contributory negligence has been for many years considered a question for the jury except when reasonable and fair-minded men cannot differ. While the de-
page 153 } fendant contends that as a matter of law the plaintiff was guilty of contributory negligence or, in the alternative, that it is a jury question, this instruction is the other way around and says as a matter of law that there is no contributory negligence. There is sufficient evidence in this case to indicate contributory negligence, particularly the dangers that were inherent in the trip and the fact that the plaintiff went to sleep, and we feel that the jury should have a right to consider those circumstances.

The defendant excepts to the ruling of the Court in granting Instruction 3. This instruction was covered by Instruction 1 and the defendant submits that there are no factors in this case to be considered by the jury other than the fact that the defendant went to sleep, and this instruction reemphasizes the same points covered in No. 1 and allows the plaintiff to suggest any number of things which could be considered in a jury's determination that the defendant was guilty of gross negligence. The defendant contends that the factor of sleep is the only one here.

The defendant excepts to the ruling of the Court in granting Instruction 4 on the grounds that the same is repetitious; Paragraph C is covered by Paragraphs A and B; and Para-

graph F is covered by Paragraphs A, B and C. Further, the defendant objects and excepts to the Court page 154 } on two occasions in the same instruction telling the jury that the award should be such as they believe to be fair, just and adequate. Those words appear twice.

The defendant excepts to the granting of Instruction 1 on the grounds that the instruction improperly submits to the jury the question of gross negligence. Defendant contends that there are no circumstances and conditions in connection with the defendant's sleeping which would indicate any gross negligence on the part of the defendant.

The defendant excepts to the ruling of the Court in refusing to grant Instruction A-1 as originally offered or as amended with the words "gross" inserted in three places in the first paragraph. The Court amended A-1 by taking the first paragraph away and granted Paragraphs 2 and 3 and called it A, to which action of the Court the defendant excepts but, in all fairness, the defendant does not except to the granting of Instruction A. It should be clear that the defendant wanted A-1, which was all three paragraphs including the presumption, which is certainly a part of this case; and it was prejudicial to the interests of the defendant not to grant it.

The defendant excepts to the ruling of the Court in refusing to grant Instruction B. The Court granted page 155 } Instruction C after giving the defendant choice between B and C. The defendant excepted and chose C and excepts to the ruling of the Court in refusing to grant Instruction B as originally offered without amendments and also in refusing B as amended by the Court. The Instruction B is a proper instruction on the standards of care and the jury should have been so advised and instructed on those principles.

The defendant excepts to the ruling of the Court in refusing to grant Instruction D on the grounds that the same is in accordance with the law and the evidence in this case. The refusal by the Court to grant this instruction on intoxication and ability to drive being impaired, means in effect that the jury has a right to infer and to assume that the defendant was intoxicated or that his ability to drive was impaired. In some very recent decisions the Supreme Court has dealt with the question of intoxication. The defendant feels that this instruction is prejudicial to his interests.

The defendant excepts to the ruling of the Court in refusing to grant Instruction E, on the grounds that the instruction is in accordance with the law and the evidence and should

have been granted on the proposition of assumption of risk.

The defendant contents that certain dangers were
page 156 } inherent in this trip and that the jury had a right
to pass on the question of whether or not the plaintiff did assume these dangers or risks and therefore was not entitled to recover.

The defendant excepts to the ruling of the Court in refusing to grant Instructions F and G, on the grounds that the question of contributory negligence or concurring negligence was one for the jury and should have been submitted to the jury for their determination. The Court's action in refusing F and G was consistent with the Court's granting Instruction 2 and the defendant objects and excepts to the refusal to grant Instructions F and G on the same grounds as previously stated with reference to the granting of Instruction 2.

The defendant excepts to the ruling of the Court in refusing to grant Instruction H, on the grounds that the same is in accordance with the law and the evidence, is a proper instruction based on the peculiar evidence in this case and the closeness of the question of whether or not the defendant was guilty of gross negligence. The instruction tells the jury that if they are unable to determine, then the defendant is not grossly negligent and the verdict should be for the defendant. This instruction was proper, it was fair, and it was prejudicial to the defendant for it not to have been granted.

* * * * *

A Copy—Teste:

H. G. TURNER, Clerk.

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