202 VA 948

Record No. 5273

FILE COPY
Clerk, Supreme Court of Appeals
Richmond, Va.

In the Supreme Court of Appeals of Virginia at Richmond

ANNE L. FINCK, ET AL., INDIVIDUALLY AND T/A, ETC.

v.

JOHN LUTHER BROCK

FROM THE COURT OF HUSTINGS FOR 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

Record No. 5273

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.

ANNE L. FINCK, ET AL., INDIVIDUALLY AND T/A, ETC., Plaintiffs in Error,

against

JOHN LUTHER BROCK, Defendant in Error.

From the Court of Hustings for the City of Portsmouth

Upon the petition of Anne L. Finck and William Edward Finck, individually and trading as Finck Bus Line, a writ of error and *supersedeas* is awarded them to a judgment rendered by the Court of Hustings for the City of Portsmouth on the 12th day of August, 1960, in a certain motion for judgment then therein depending wherein John Luther Brock was plaintiff and the petitioners were defendants.

And it appearing that a *supersedeas* bond in the penalty of twelve 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

* * * * *

MOTION FOR JUDGMENT.

* * * * *

5. That as a direct result of your negligence:

* * * * *

page 2 }

* * * * *

(e) He has been denied and will be permanently denied many of the pleasures and recreations he was able to enjoy before this accident; among which are riding a bicycle, swimming, playing ball or activity which calls for running.

Filed in the Clerk's Office the 24 day of June, 1959.

Teste:

JOHN R. PORTER, JR., Clerk
LILLIE MAE HEAFNER, D. C.

* * * * *

page 33 }

* * * * *

August 10, 1960.

Robt. F. McMurran
Judge
John R. Porter, Jr.
Clerk

Mr. William L. Ward
Attorney at Law
508 Citizens Bank Building
Norfolk, Virginia

Mr. C. Lydon Harrell, Jr.
Attorney at Law
559 Haddington Building
Norfolk, Virginia

In *Re*: John Luther Brock v. Anne L. Finck, et al., etc.

Gentlemen:

The Court in hearing the argument for a new trial had not had the benefit of a transcript of the evidence but had been compelled to rely upon its recollection of the evidence and statements of counsel. These have been cheerfully, candidly, and fairly given by both counsel.

Since there was a verdict for the plaintiff the facts must be viewed in the light most favorable to him. Briefly stated, the plaintiff was a paying passenger on the bus operated by the defendants' agent. He was returning home from his labors at the Norfolk Naval Base on the afternoon of the accident. When the bus arrived at the corner of Harrison and Fourth Streets in the City of Portsmouth, that being the nearest corner to his home, he was discharged from the bus. As it had been raining very shortly before the bus came to this intersection, the gutters were filled with water to the top level of the street curb stones. The driver of the bus, which bus was described as a very long one, stopped it at an angle of about 45° to the sidewalks and about 8 to 10 feet from the curbing (testimony of Lindsay Arthur West). This was done so that the plaintiff might alight on a dry spot. It was claimed by the defendants that as there were cars parked parallel to the curb on the west side of Fourth Street to within one car length of the north side of Harrison Street, the bus could not be "pulled up" to the curb to discharge the passenger. It thus appears that the long bus blocked or almost blocked the right half of the page 34 } vehicular portion of Fourth Street and left an 8 or 10 foot space between the front of the bus on its right and the sidewalk in which bicycles, motorcycles, and small compact motor cars might pass. Through this area the bicycle ridden by Lindsay Arthur West, a boy of sixteen years, came and struck the plaintiff causing the severe and permanent injuries of which he complained.

Although the plaintiff insisted that the defendants' agent had violated the statute relating to the stopping of vehicles on

the highways so as to impede other traffic and this constituted negligence, the case was submitted to the jury on the theory of common law negligence. Parenthetically the ordinances of the City of Portsmouth dealing with the same subject matter contained in the State statutes were not offered in evidence and the applicability of the State law to city streets was questioned. However, the Court was of the opinion that the Statutes mentioned were not applicable to this plaintiff in this case. As there was a verdict for the plaintiff he does not now complain of this ruling and the defendants cannot.

The issue therefore which was presented to the jury was whether the bus operator in stopping his bus at a 45 degree angle about 8 to 10 feet from the curb created a dangerous condition, constituting negligence.

The real basis of negligence is not carelessness, but conduct or behavior which should be recognized as involving unreasonable danger to others. In other words, has the defendants' conduct created an unreasonable risk to the plaintiff?

The case of *Scott* v. *Sims*, 188 Va. 808 seems to fix liability on this grounds. In this case the improper parking of an automobile exposed the child to an unreasonable
page 35 } danger.

From a reading of the cases cited by counsel, the Court is of the opinion that the defendant would be responsible for damages directly caused by his negligence, even though he could not have anticipated them at the time. *A. C. L. R. R.* v. *Wheeler*, 147 Va. 1. See also Prosser on Torts, 2d Ed. page 258.

In the case of *A. C. L. R. R.* v. *Wheeler, supra,* West, J. cited with approval *N. & W. Ry. Co.* v. *Whitehurst,* 125 Va. 263, 99 S. E. 569 "wherein Judge Burk, speaking for the court said: 'When once it has been determined that the act is wrongful or negligent, the guilty party is liable for all the consequences which naturally flow therefrom, whether they were reasonably to have been anticipated or not. * * * The precise injury need not have been anticipated. It is enough if the act is such that the party ought to have anticipated that it was liable to result in injury to others.' "

Now whether the conduct of the bus operator in stopping in the manner shown by the evidence created an unreasonable risk to the plaintiff is purely a jury question, as is the question of whether such behavior was the proximate cause of the accident.

In the case of *Cleveland Ry. Co.* v. *Crooks,* 125 Ohio St. 280, 181 N. E. 102, whether defendant operating motorbus,

by stopping ten feet from curb, created dangerous condition, constituting negligence, which caused injuries to a passenger struck by automobile on alighting, it was held to be a question of fact, for the jury's determination.

The contributory negligence, if any, of the plaintiff was likewise a question for the jury.

If the defendants' primary negligence is established and it proximately contributes to the plaintiff's injuries, then the negligent acts of the bicycle rider would be a concurring cause and not an intervening or supervening cause relieving defendant of liability.

page 36 } The defendant asks that the verdict be set aside and a new trial granted for misconduct of plaintiff's counsel in his opening statement to the jury. The plaintiff's counsel stated his client was married and was the father of seven children. Defendant timely objected and asked for a mistrial. The Court sustained the objection, told the jury to disregard this statement and asked the jury if they could disabuse their minds of the statement and try the case solely upon the evidence to be offered. The jury unanimously indicated they could. Therefore the motion for a mistrial was denied. No further mention was made in the evidence as to the *number* of plaintiff's children, but as an element of damage it was shown that the plaintiff on account of his injuries was unable to play with some of his children with the same facility as before his injury.

There is nothing to indicate that the defendant was in any way prejudiced by this remark of plaintiff's counsel nor does it appear that the remark generated any sympathy for the plaintiff. On the contrary, considering the size of the verdicts in modern times, and the grave, serious, and permanent injuries the plaintiff suffered, it would appear he only obtained what might be called a conservative verdict.

The defendants' motion to set aside the verdict and enter judgment for the defendant is denied, and the motion for a new trial is over-ruled. Judgment will be entered on the verdict.

Yours very truly,

Judge.

RFM/mvw

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* * * * *

At the Court of Hustings for the City of Portsmouth held on the 12th day of August, 1960.

* * * * *

This day again came the parties by their attorneys, and thereupon, the motion of the defendants to set aside the verdict and enter judgment for the defendants being fully heard is dismissed, and the motion of the defendants to grant them a new trial being fully heard is overruled, and judgment is entered on the verdict of July 26, 1960; it is therefore considered by the Court that the plaintiff recover of the defendants the sum of Ten Thousand Dollars ($10,000.00) with interest thereon to be computed after the rate of six per cent per annum from the 26th day of July, 1960 till paid and his costs by him about his suit in this behalf expended, to which action of the Court the defendants, by counsel, excepted, and on the further motion of the said defendants, by counsel, a stay of execution is granted them for sixty (60) days, the defendants having indicated their intention to apply to the Supreme Court of Appeals for a writ of error, upon the execution before the Clerk of this Court by the defendants or by someone for them of a bond in the penalty of Twelve Thousand Dollars ($12,000.00), conditioned according to Sections 8-465 and 8-477 of the Code of Virginia.

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ASSIGNMENTS OF ERROR.

1. The Court erred in refusing to grant defendants' motion for a mistrial on the basis of the statement of plaintiff's counsel in his opening statement to the jury that the plaintiff was the father of seven children.

2. The Court erred in refusing to sustain defendants' motion to strike the plaintiff's evidence and enter summary judgment for the defendants made at the conclusion of the plaintiff's evidence on the ground that there was no evidence

of actionable negligence on the part of the defendants or their agent.

3. The Court erred in refusing to sustain defendants' motion to strike the plaintiff's evidence and enter summary judgment in favor of the defendants made at the conclusion of all the evidence on the ground that there was no evidence of actionable negligence on the part of the defendants or their agent.

page 42 } 4. The Court erred in refusing to sustain defendants' aforesaid motions made at the conclusion of the plaintiff's evidence and at the conclusion of all the evidence on the ground that the plaintiff was guilty of contributory negligence as a matter of law.

5. The Court erred in granting Instruction "A" at the instance of the plaintiff, said instruction being merely an abstract statement of law which provided no guide for the jury and which was inapplicable to the facts and circumstances of the case.

6. The Court erred in granting Instruction "B" at the instance of the plaintiff insofar as said instruction deals with loss of earnings in the future for there was no evidence that the plaintiff would suffer any loss of earnings in the future and, further, said instruction is erroneous in allowing "deformity, humiliation and embarrassment" as elements of damage.

7. The Court erred in granting Instruction "D" at the instance of the plaintiff for this instruction inaccurately states the law and is confusing and misleading in the language employed.

8. The Court erred in refusing to sustain defendants' motion to set aside the verdict of the jury as being contrary to the law and the evidence and entering judgment in favor of the defendants.

ANNE L. FINCK AND WILLIAM
EDWARD FINCK, T/A FINCK
BUS LINE
By WILLIAM L. WARD
Their Counsel.

(on back)

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Filed the Court of Hustings Sep. 15, 1960 10:21 A. M.

JOHN R. PORTER, JR., Clerk.

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page 3 }

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(The following is an excerpt from opening statement of counsel for the plaintiff):

"He lost $500.00 from work. His wages were $109.00 a week, and he lost over $2300.00 in wages.

"He has a permanent injury to his leg, permanent partial disability, which will get worse, according to the doctor's testimony, in the future. It will not get better, but worse as he gets older.

page 4 } "It has cost him a loss of $1,000.00 in medical and hospital expenses and a loss of pleasures and recreation because he is unable to do a lot of things he ordinarily would do.

"He has seven children and—"

Mr. Ward: If your Honor please, I would like to make a motion.

The Court: I will hear you in chambers.

(Court and counsel retired to chambers).

Mr. Ward: The defendant moves for a mistrial on the basis of the plaintiff's opening statement in which he alluded to the fact that the plaintiff had seven children, and the only possible purpose for mentioning the fact that he has seven children was to create sympathy, and I think it is prejudicial and move for a mistrial.

Mr. Harrell: If he had let me say one more sentence I was going to say that being unable now to do the things he used to do, he is unable to play with his children as he used to. That is the next statement I was going to make. I oppose a mistrial, and if you wish to make some statement to the jury in connection with this that you think is appropriate,

page 5 } it is perfectly all right with me.

The Court: I am going to tell the jury to disregard the statement about the seven children as it has no bearing upon the facts of issues in this case, and am going to ask them if they can proceed to trial and ignore what you have said.

Mr. Harrell: I don't want to make any statement that might be improper. I want to make a statement that he is unable to play with his children as he used to.

The Court: I think that would be proper evidence, but I don't think I would make it in the opening statement.

Mr. Ward: I save the point, your Honor.

(Court and counsel returned to the Courtroom).

The Court: Gentlemen of the jury, the Court wants to ask you to disregard any statement made in reference to the man having seven children. It has nothing to do with the issues in this case.

Can you go ahead and try the case and not be influenced by the fact that the man has seven children, or not?

page 6 } Let the record show that the jury indicated they could.

(Opening statement of counsel for the plaintiff was concluded, after which an opening statement was made by counsel on behalf of the defendants.

Mr. Harrell: Your Honor, I would like to suggest that we exclude the witnesses.

The Court: All right. Mr. Sergeant, separate the witnesses.

(The witnesses were sworn and excluded).

Mr. Ward: I think that motion is untimely after the opening statement.

The Court: I agree with you, but it has been made and I can only correct what has been done, and I will let him separate the witnesses.

Mr. Ward: We except, may it please the Court.

page 7 } LINDSAY WEST,

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

DIRECT EXAMINATION.

By Mr. Harrell:

Q. State your name.

A. Lindsay West.

Q. Where do you live at the present time?

A. I stay with my brother-in-law at 2911 Chestnut Street.

Q. How old are you?

A. Sixteen.

Q. How old were you when this accident happened?

A. Fourteen.

Lindsay West.

Q. On the day this accident happened, where had you been?
A. Sir?
Q. On the day this accident happened, where had you been?
A. To the Boy's Club.
Q. Where were you going when the accident happened?
A. Home.
page 8 } Q. What method of conveyance were you using?
A. Bicycle.

Mr. Ward: I wonder if the members of the jury can hear him? It is difficult for me to hear down here.
The Court: Speak up louder.

By Mr. Harrell:
Q. Were you involved in an accident?
A. Yes, sir.
Q. What part in the accident did you play?
A. I hit a man with the bicycle.
Q. Were you going in the same direction of the bus or opposite direction?
A. I was going the same way the bus was going.
Q. Have you drawn a diagram of the intersection, the place that the bus was, and where this happened?
A. Yes, sir.
Q. Did this accident happen in the City of Portsmouth, Virginia?
A. Yes, sir.

Mr. Ward: I think if he is going to draw a diagram he ought to do it now.
Mr. Ward: I will let this gentleman draw it
page 9 } while I ask questions in order to save time.

By Mr. Harrell:
Q. You say you were going in the same direction the bus was going?
A. Yes.
Q. Was the bus moving or standing still when you struck? Had the bus stopped down at the place when you struck him?
A. Yes, sir.
Q. Were you a foot or two feet from the bus when you struck him?
A. I don't know.
Q. How far was he from the bus when you struck him?
A. Not very far.
Q. How far?

A. A couple of feet.

Q. How far was the front of the bus from the curb when you struck him?

A. I would say eight or ten feet.

Q. How far was the back left of the bus from the center of the street as you approached the bus?

A. I don't know exactly.

Q. Can you give us an estimate?

page 10 } A. I could not.

Q. Was it closer to the center of the street or the right-hand curb?

A. It was closer to the center of the street.

Q. Approximately how far behind the bus were you when the bus stopped?

A. About 20 feet.

Q. Were you planning to go around the left-hand side of the bus or the right-hand side of the bus?

A. The right-hand side of the bus.

Q. When the bus—first of all, were you planning on going on the left-hand side of the bus toward the center of the street or on the right-hand side?

A. On the right-hand side.

Q. The bus and curb—

Mr. Ward: I think he answered that, and it is leading.

The Court: I don't think it is leading.

A. The right-hand side.

By Mr. Harrell:

Q. Why were you going around the right-hand side?

A. Because I was going to turn right.

page 11 } By the Court:

Q. Where?

A. Where I struck the man. I don't know the name of the street.

By Mr. Harrell:

Q. Was there enough room for you to go around on the left-hand side of the bus without crossing the white line?

A. I don't think so.

Q. Is there a white line down the middle of the street?

A. Yes, sir.

Q. Was there traffic coming from the opposite direction?

A. I don't remember exactly.

Q. After you hit Mr. Brock, what happened?

Lindsay West.

A. I went over the handle bars of the bicycle in the mud.
Q. What happened to him?
A. He was laying in the water, too.
Q. Was he in the water or a dry spot when you first hit him?
A. I don't know when I first hit him, but he was in the water when I knocked him down.
page 12 } Q. When you knocked him down he landed in the water?
A. Yes.

Mr. Ward: I object to that.
The Court: I sustain the objection.
Mr. Harrell: I wanted to find out what he was going to say.
Mr. Ward: But we want to find out what his witness has to say and not you.
Mr. Harrell: I withdraw the question, your Honor.

By Mr. Harrell:
Q. Did you see Mr. Brock when he got down from the bus?
A. At the time I saw him I struck him, at the time he stepped out. I didn't have a chance to stop.

Mr. Harrell: Answer Mr. Ward's questions. Just a minute. I forgot to put this diagram in, your Honor.
Your Honor, Dr. Kirk, the medical witness, has just come in.
The Court: Dr. Kirk, you'd better come back here and stay until you are called.

By Mr. Harrell:
Q. Will you draw a line down Fourth Street
page 13 } where the white painted line is?
A. This is Fourth Street.
Q. Yes. Going north is down here (indicating). This is Fourth Street.
A. Yes, sir.
Q. We are headed toward the Navy Yard?
A. Yes.
Q. You were heading toward the Navy Yard the same way the bus was going?

The Court: May I suggest that you go down before the jury so they can see it.

Lindsay West.

By Mr. Harrell:
Q. Will you draw a white line down Fourth Street?

A. (The witness indicates on diagram).

Q. Now, will you draw the bus, the way it was stopped as you approached it?

A. (The witness indicates on diagram).

Q. Have you paced off from the curb to the place where the right-hand side of the bus was stopped?
A. I paced off a close estimate with my feet and estimate it at about 10 feet.

Mr. Ward: I suggest that he draw a diagram.

page 14 } By Mr. Harrell:
Q. Where was Brock when you hit him?
A. Getting out of the bus and stepping down.

The Court: Put an "x" mark there.

By Mr. Harrell:
Q. Was the bus stopped at an angle from the corner or parallel to the curb?
A. Just like I have it here, I think.

Mr. Harrell: Answer Mr. Ward.
The Court: Do you want to mark that as an exhibit?
Mr. Harrell: Yes, sir.
The Court: Plaintiff's Exhibit #1.

CROSS EXAMINATION.

By Mr. Ward:
Q. Mr. West, you just told us that you had stepped off the distance from the curb to where the bus was; is that correct?
A. Yes, sir.
Q. When did you do hat?
page 15 } A. Yesterday evening.
Q. Did you happen to be with this gentleman here (indicating)?
A. Yes, sir.

Lindsay West.

Q. Mr. Brock was hurt on December 20th, 1957?
A. Yes, sir.
Q. It was not until yesterday, at the request of this man who works for Mr. Harrell that you went back to the spot, is that correct?
A. Yes, sir.
Q. Mr. West, do you have a copy of statement of April 22nd, 1959, in which you—

* * * * *

page 18 }

* * * * *

By Mr. Ward:
Q. I ask you if, on or about April 22nd, 1959, a little more than a year ago—
A. (Interposing) I remember a man coming to see me.
Q. Did you make this statement at that time (handing paper to witness)?

Mr. Harell: I object to him reading to him any statement he made.
Mr. Ward: I will read from the yellow paper.
The Court: Are you talking about an oral statement this boy made?
Mr. Ward: Yes, sir.
The Court: Go ahead.
Mr. Harrell: This is the same thing you sustained the objection to in chambers. What is the difference between a written one and an oral one?
The Court: I overrule the objection.

page 19 } By Mr. Ward:
Q. Did you make this statement at that time that the front of the bus from which Mr. Brock came out of onto the street was three or four feet from the curb?
A. Well, I reckon I did.
Q. Do you recall there were automobiles parked on the right-hand side of Fourth Street almost to the corner?

Mr. Harrell: I object. The attorney is testifying for him. He said, "Do you recall?"
The Court: I overrule the objection.
Mr. Harrell: Exception.

Lindsay West.

By Mr. Ward:

Q. It is a fact, isn't it, that cars were parked on the side of Harrison and Fourth Streets almost to the corner?

A. To tell you the truth, I don't remember. It has been a long time ago.

Q. Going back to this, check this down here (indicating) and see whether some of it doesn't make you recall that you testified that the bus was eight or ten feet from the curb?

A. I don't recall.

Q. Did you state it was eight or ten feet from the curb?

A. No, sir.

page 20 } Q. Doesn't this seem a little strange to you—

Mr. Harrell: Your Honor, I object. He says, "Doesn't it seem strange to you?"

The Court: I sustain the objection.

By Mr. Ward:

Q. You cannot remember that there were cars parked on the right-hand side of Fourth Street?

A. I can't recall because it has been too long ago, yes.

Mr. Harrel: I object to this. There has been no evidence whatsoever that there were any cars parked on Fourth Street. Mr. Ward is attempting to testify that there were.

The Court: Rephrase the question.

By Mr. Ward:

Q. You don't recall whether there were cars parked on the right-hand side of Fourth Street about where Mr. Brock was hit by you on your bicycle?

A. No.

Q. You don't remember it because it was so long ago?

A. Yes.

Q. And yet you can come here and recall the number of feet the bus was from the curb?

page 21 } A. I didn't say I remembered exactly how many feet.

Q. There was not enough room for an automobile to go where your bicycle went without hitting the bus?

A. No, I don't reckon so.

Mr. Ward: That is all.

By the Court:

Q. What was the condition of the weather?

Dr. Arthur Kirk.

A. I don't remember whether it was raining then. I don't think it was, but it had been raining and there was water in the street.

Mr. Harrell: That is all, your Honor.

DR. ARTHUR KIRK,
called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

page 22 } By Mr. Harrell:
Q. Doctor, please state your name.
A. Arthur A. Kirk.
Q. Your address?
A. 108 Fort Lane, Portsmouth.
Q. What is your profession?
A. Orthopedic surgeon.
Q. Where is your office?
A. 108 Fort Lane, Portsmouth, Virginia.
Q. How long have you been practicing medicine in Portsmouth?
A. Since 1951.
Q. What pre-medical training did you have?

Mr. Ward: We will admit he is an expert in his field.
The Court: All right.

By Mr. Harrell:
Q. What type of work do you specialize in?
A. Orthopedic surgery, which deals with the bones and joints.
Q. How long have you been engaged in that work?
A. Since 1951.
Q. Did you see as a patient the plaintiff here, John Luther Brock, as a result of an injury he received on De-
page 23 } cember 20th, 1957?
A. Yes.
Q. Will you tell us what injuries he received, what treatment he received, and his condition, etc.?
A. Yes. I saw Mr. Brock at the Portsmouth General Hospital on the 20th of December, 1957. He gave a history of an accident, being hit by a boy on a bicycle the same day.
He injured his knee in the right lower part, and the left hip. He had a swelling of the right knee.

Dr. Arthur Kirk.

The knee was unstable and you could move it from side to side. We straightened it out and put a compress against the knee.

We had an x-ray taken which showed a fracture of the outer side of the knee joint in the tibia, which is the larger bone. That is the lower part of the leg at the outside right at the joint surface.

Q. I would like to ask if some pictures of the knee joint will help you in explaining this.

A. I think so, yes.

Mr. Ward: May I see that?

Mr. Harrell: Yes.

By Mr. Harrell:

Q. Will you step down before the jury and show where the fracture was?

page 24 } A. Through this outer side of the knee joint, this point here.

This part here was mashed and it was a depressed fracture. This is looking down from the back, and this from the front. This part was mashed down (indicating on x-ray).

Q. You mentioned an injury to the hip and right leg. What injury did he receive to the hip?

A. Bruised.

Q. No permanent injury to that?

A. No.

Q. You mentioned he had instability in the knee. What trouble, if any, would that result in?

A. Actually, he had an instability of the knee at the time we first examined him, and at the time of the last examination he had very little instability, I would say approximately five degrees at most.

That means side to side motion is slightly increased over his motion on the opposite knee. That, in my opinion, is due to partial tearing of the leg, and of the innter side of the knee.

It has apparently since healed and the ligaments on the inner side the last time I saw him were fairly stable. It had a slight increase of motion, but not very much.

Q. You say he had a fracture of the tibia?

A. Yes, the surface that holds the thighbone off

page 25 } the knee up on this end (indicating).

Q. How does a fracture of this nature affect a person?

A. Had you rather for me to go ahead through the treatment?

Dr. Arthur Kirk.

Q. Yes?

A. A closed reduction was done on the 20th of December and he was discharged from the hospital three days later in a leg cast extending from his toes to his upper thigh in a bow leg position.

The cast was removed on the 14th of February at the hospital and an x-ray taken which showed that the fracture was improving and he was put on slight weight bearing.

On the 3rd of March, 1958, he was started on exercise to get this knee stronger so his knee would not give way. He was put on crutches.

In addition to this exercise in front he was exercised in the back to help him get his knee back to normal.

On the 10th of April, 1958, he was put on full weight bearing for the first week without having to use any crutches, and when seen on the 15th of May, 1958, it was felt he could return to regular work on the 19th of May, 1958.

It was also recommended that he ride his bicycle so as to limber his knee up.

When last seen on the 22nd of July, 1960, he had page 26 } some stiffness and weakness—he complained of stiffness and weakness more than he had prior to the accident.

Prior to the accident he had had a fracture in the thighbone and had had a bone graft taken from the lower leg and put in the thighbone so it would heal.

This prior trouble had nothing to do with the accident. He also had some stiffness of his knee prior to the accident, and he felt he had an increased stiffness and weakness.

He had some grating in the kneecap and also had some grating on the outer side of the knee. When you pulled it up you would feel it pop and grate.

He could bend his knee to aproximately 65 degrees, but I have no way of knowing how far he could bend it prior to the injury.

He said he had difficulty riding his bicycle and keeping his foot on it, more than he did prior to the injury.

On further examination he found he was tender underneath the kneecap in front of the knee joint on both sides, and down in the region where the fracture was just above it, what we call the flat pad, or cap in front of the knee joint.

He had what we call moderate traumatic arthritis which follows an injury of this kind of the knee joint.

It is my opinion that the plaintiff had at the time of the accident a ten per cent increase over the previous disability he

had with the knee and leg, and we estimated a
page 27 } 20% increase in permanent partial disability as a
result of the injury on the 20th of December, 1957,
resulting from this accident that he had on that day.

It is my opinion that the injury to his knee joint will actually cause him more rapid wearing of the knee, which will help increase the disability to the knee to 20% in the future, and as time goes on it will get worse. I can't give a perfect estimate. I don't attempt to.

I can only say that he has a fracture in the knee joint and fractures in the knee joint usually give more disability as the patient gets older.

Q. How much of his present 10% and future 20% were caused by this accident?

A. It is my opinion that all of the 10% I found at the time of the examination, and the 20% I estimated as due to the accident he had on the 20th of December, 1957.

Q. Doctor, you mentioned the plaintiff has grating in the knee joint and some other things.

How will this affect him in the future in his work?

A. It is my opinion that the injury to the knee joint will prevent him from lifting, walking as much as he had previously, and climbing steps as well as he was previously able to do.

Q. How would it affect him as to pain?

A. It is my opinion on much exercise he will have
page 28 } some swelling in that joint from time to time.

Q. What are your charges for your treatment of Mr. Brock?

A. $220.00.

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page 30 }

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ROBERT L. ANDERSON,

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

DIRECT EXAMINATION.

By Mr. Harrell:

Q. State your full name, please.

Robert L. Anderson.

A. Robert Lionel Anderson.
Q. Where do you live?
A. 1224 Duke Street, Portsmouth.
Q. Where are you employed?
A. N.A.S., Norfolk.

Q. What means of transportation do you use to
page 31 } get to and from work?

A. The majority of the time I use transportation of Mr. and Mrs. Finck.
Q. The bus line?
A. Yes.
Q. Do you pay for that transportation?
A. Yes.
Q. What do you pay?
A. Three dollars a week. If I only ride two days it is sixty cents a day.
Q. Were you on the bus on the day Mr. Brock was struck?
A. Yes.
Q. Where were you sitting?
A. I was sitting on the last seat on the right side, looking towards the front of the bus.
Q. At what intersection did the bus stop to let Mr. Brock off?
A. The intersection of Fourth and Harrison Streets.
Q. Is that in the City of Portsmouth?
A. Yes.
Q. When the bus stopped how far was the right front side of the bus from the curb?
A. The right front side?

Q. Yes?
page 32 } A. I would say the right front side was about eight feet.

Q. From the curb?
A. Yes.
Q. How far was the right rear side of the bus from the curb when it stopped?
A. He had the bus on approximately a 45 degree angle. I would say the right back end of the bus was approximately 12 feet.
Q. From the curb?
A. Yes.
Q. Were there any cars parked anywhere along by the curb where the bus stopped?
A. Yes.
Q. Were there any cars parked at the curb, between the bus and the curb?

Robert L. Anderson.

A. No, sir.

Q. If you draw a line out from the curb to the rear of the bus, how far back was the bus from the cars?

Mr. Ward: He said at the corner there were no cars, but he hadn't said how far back the car was.

The Court: I overrule the objection.

A. He asked me the question was there any cars.

page 33 } By Mr. Harrell:

Q. The first question was were there any cars at the curb at all in that block?

A. I said yes. There were cars parked in that block.

Q. Were there any cars between the bus and the curb?

A. No.

Q. How far back from the back end of the bus up to the curb was the nearest automobile?

A. I would say approximately 10 feet.

Q. Were there any cars between that automobile and the end of the block where the bus was?

A. No.

Q. Did you see the accident happen?

A. My attention was limited at that time. The only thing I seen was the boy on the bicycle kind of fall over the bicycle and then I realized he had hit Mr. Brock.

Q. Did you get out of the bus and see where Mr. Brock was?

A. Yes. I think I was the first one off.

Q. What was Mr. Brock doing then?

A. He was laying off from the corner of Harrison and Fourth Streets. If you have got the bus to the south he was approximately southwest.

page 34 } Q. What was his condition as to pain and suffering at that time?

A. He was in pain and suffering, and we put him back on the bus, and I asked Mr. Brock if he wanted me to go with him, get my car and take him to the doctor, and he said he didn't want to, that he was scared.

We put him back on the bus and took him back around to his house and took him off and took him into his house.

Q. What means of walking did he have after the accident?

A. He couldn't walk.

Q. How was he transported from one point to the other?

A. If I am not mistaken, Jim Brammer and myself put him on the bus, and removed him and took him in the house.

Robert L. Anderson.

Q. In what way did you do this?
A. Made a sling from shoulder to shoulder, and he put his arms around my shoulder and Mr. Brammer's shoulder.

Mr. Harrell: Answer Mr. Ward.

CROSS EXAMINATION.

By Mr. Ward:

Q. It had been raining hard that day, hadn't it?
page 35 } A. Yes.
Q. The water was at the curb, almost?
A. Yes.
Q. And the water extended some feet on out into the street, did it not?
A. Yes.
Q. I imagine when this happened your main concern was to see if Mr. Brock was hurt and to render assistance to him? You were not interested in how many feet the front of the bus was or how many feet the rear of the bus was; you were interested in Mr. Brock?
A. Yes, and other than that I was kind of observing this in case I was called into Court.
Q. Have you talked to Mr. Swertfeger, who is sitting over here?
A. Yes.
Q. When was the last time you talked to him?
A. The first time I talked to him and the last time, which was the only time, was, I guess, about four or five months ago.
Q. Four or five months ago?
A. Yes.
Q. Did he take you out to where this accident happened?
A. No, sir.
page 36 } Q. Did you meet him out there?
A. No.
Q. Did he suggest to you that the front of the bus might be about eight feet from the curb?
A. No, sir.
Q. There was nothing unusual said to you about the way the bus stopped out there, was there?
A. Nothing unusual?
Q. Nothing unusual about the stop Mr. Simpson made, was there?

Robert L. Anderson.

A. The only thing unusual was, I believe, that Mr. Simpson should or could have gotten closer.

Q. If he had gotten closer he would have put him out in the water, would he?

A. (No response).

Q. I believe you told us the water was up to the curb. What was to prevent him from—

A. I believe he could have put him out on the curb.

Q. He came in at a 45 degree angle, approximately?

A. Yes.

Q. There is nothing unusual about the street there. It is flat, isn't it?

A. It retains water.

Q. There were no holes in the street there?

A. No.

page 37 } Q. There is nothing wrong with the street, is there?

A. No.

Q. The bus had to come in at some angle?

A. Yes.

Q. That is because of the cars that were parked there?

A. You say because of the cars parked there. Because of the cars—in my judgment he could have come closer.

Q. He still would have to come in on an angle?

A. Yes.

Q. He could not have gotten the bus completely over to the curb?

A. Unless he pulled up on Harrison Street.

Q. And continued up?

A. Yes.

By the Court:

Q. Did he get off at the front door? Is there a rear door or a front door?

A. There is a rear door and a front door.

Q. Where did Mr. Brock get off, the front door?

A. Yes.

By Mr Harrell:

Q. You said Mr. Simpson could have put him off on the sidewalk. Does the sidewalk run down to the curb?

page 38 } A. Yes, the sidewalk runs down to the curb.

Hr. Harrell: That is all.

JAMES ROBERT BRAMMER,
called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Harrell:
Q. Mr. Brammer, state your full name.
A. James Robert Brammer.
Q. Where do you live?
A. 211 Fifth Avenue.
Q. Is that in the City of Portsmouth?
A. Yes.
Q. Where are you employed?
A. Naval Air Station, Norfolk, Virginia.
Q. What means of transportation do you have to
page 39 } get there?
A. I ride the Finck bus.
Q. Do you pay for your transportation?
A. Yes.
Q. How much?
A. $3.00 a week.
Q. Were you on the bus the day Mr. Brock was injured when he was struck by the bicycle?
A. Yes, sir.
Q. Where were you sitting on the bus?
A. I was seated on the left rear.
Q. When the bus came to a stop how far was the left rear of the bus from the white center line of the street?
A. Fairly close to it, several feet.
Q. Was there room enough for the boy on the bicycle to go around the back end of the bus without crossing the white line?

Mr. Ward: That calls for a conclusion. He is not competent to testify to matters that call for a conclusion.
The Court: I overrule the objection.
Mr. Ward: I save the point.

A. What was the question?

By Mr. Harrell:
Q. Was there room enough for the boy on the
page 40 } bicycle to go around the back end of the bus without crossing the white line?
A. It would have been mighty close to the white line. He may have, but it would have been pretty close.

James Robert Brammer.

Q. After the accident happened did you get off the bus or stay on it?

A. I got off the bus.

Q. What did you find when you got off?

A. Mr. Brock was laying on the side of the curb between the bus and the curb in some water, and Mr. Anderson and I helped him out and got him up on the curb.

We were the first to get off the bus.

Q. What was Mr. Brock's condition as to pain and suffering when he got off?

A. When he got off?

Q. When you got off?

A. He was like anybody else who would get hit. He was not feeling good.

He could tell you more about that, but his knee looked like it had been twisted, or something, or swollen.

Q. When you got off the bus did you notice whether any automobiles were parked along the curb near where the bus stopped?

A. Several cars.

Q. Were there any cars in between the bus and
page 41 } the curb?

A. No.

Q. How far back from the back end of the bus was the nearest automobile?

A. I could not say. I didn't judge it or pay any particular attention to it, but I believe there was room enough for the bus to park.

Q. Was there room enough for the bus to come on up to the curb?

A. Maybe not the whole rear end, but around the door there was room enough.

Q. How far was the right front of the bus from the curb when you got off the bus?

A. I would say seven or eight feet.

Q. Where was the bicycle lying when you got off the bus?

A. In the street between the bus and the sidewalk or curb.

Q. Were there any people standing out there?

A. Yes. Some of the boys got off the bus.

Q. Where were they standing in relation to the bicycle and curb?

A. They were standing in the street between the bus and curb.

Q. Were any of them standing between the bicycle and curb?

page 42 } A. I couldn't really say. I was busy with John.

John Luther Brock.

Mr. Harrell: Answer Mr. Ward's questions.

CROSS EXAMINATION.

By Mr. Ward:

Q. You were on the left rear of the bus?

A. Yes.

Q. I assume you were looking forward toward the front?

A. Yes.

Q. When did you first see the bicycle?

A. When I got off the bus.

Q. You didn't actually see the bicycle strike Mr. Brosk?

A. No, sir.

Q. Your interest, when you realized Mr. Brock had been hurt, was to get off and render assistance to him?

A. Yes.

Q. You were not interested in taking any measurements as to where the front or rear of the bus was?

A. No.

page 43 } Q. Do you remember talking to Mr. Swertfeger, who is sitting at the end of the table here?

A. Yes.

Q. How long ago?

A. About two years.

Q. Two years ago; is that right?

A. I talked to one of the gentlemen then.

Q. How about the gentleman at the end here, have you talked to him recently?

A. Yes.

Q. How recently was that?

A. I talked to him today.

Q. How about before today?

A. It has been three weeks or a month.

Q. He didn't by any chance suggest to you what position you would place the bus in, did he?

A. No. He asked me questions but didn't suggest anything to me.

Mr. Ward: That is all. Thank you.

Mr. Harrell: That is all, your Honor.

The Court: You may stand aside.

page 44 } JOHN LUTHER BROCK,

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

John Luther Brock.

DIRECT EXAMINATION.

By Mr. Harrell:

Q. State your full name?

A. John Luther Brock.

Q. How old are you?

A. I am 39, sir.

Q. Where do you live?

A. 312 Fifth Street.

Q. Is that in the City of Portsmouth, Virginia?

A. Yes, sir.

Q. Where are you employed?

A. Naval Air Station, Norfolk, Virginia.

Q. What means of transportation do you use to get to your work and back home?

A. Mr. Finck's bus.

Q. Do you pay for your passage on that bus?

A. Yes, sir, $3.00 a week if I ride over three days.

Q. On this particular day you were hurt, December 20th, 1957, were you a paying passenger on Mr. Finck's bus?

page 45 } A. Yes.

Q. Had you paid for the transportation that week?

A. Yes.

Q. Was it for that week?

A. Three days.

Q. What type of work do you do at the Air Station?

A. Aircraft Mechanic.

Q. What were your wages at the time this accident happened?

A. It varied. When the accident happened it was $105.60, and after that it went up to $109.60.

Q. Is that per week or month?

A. Eleven weeks, I would say.

Q. Is that $105.60 the wages for a week, a month or two months?

A. A week.

Q. After the accident happened, when were you first able to go back to work?

A. On May 18th, 1948—1958, excuse me.

Q. How many weeks at work did you miss when your wages were $105.60 a week?

A. Eleven weeks.

Q. How many weeks did you miss when your wages were $109.60?

John Luther Brock.

A. Ten weeks.

page 46 } Q. What were your hospital expenses in this case?

A. $98.18.

Q. Have you paid that?

A. Yes, sir.

Q. What hospital was it?

A. Portsmouth General.

Q. How long were you there as a patient?

A. I went in on Friday night and came out on Monday.

Q. I show you a bill dated February 9th, 1959, addressed to Mr. John Luther Brock by the Portsmouth General Hospital in the amount of $98.18. Is that a bill for services the hospital rendered you as a result of this injury?

A. Yes, sir.

Mr. Harrell: I offer this in evidence, your Honor.

The Court: Plaintiff's Exhibit 2.

By Mr. Harrell:

Q. How about Dr. Kirk's bill, who was treating you?

Mr. Ward: I think Dr. Kirk has already testified to that.

Mr. Harrell: I withdraw the question.

By Mr. Harrell:

Q. Will you add up your total monetary loss you

page 47 } have suffered as a result of the accident?

A. Yes, sir, I have.

Q. What is it?

A. $2,739.78.

Mr. Ward: What was that statement? I didn't get that.

A. $2,739.68.

By Mr. Harrell:

Q. How much of that is for wages at $105.60 a week?

A. $2,312.00. I don't believe I have checked that.

Q. At the time you were riding this bus was there water in the gutter?

A. Yes.

Q. How far did the water extend out from the curb?

A. I would have to make a guess. I would say maybe two and a half feet.

John Luther Brock.

Mr. Ward: If he can't estimate it, he shouldn't make a guess.

The Court: You can give an estimate.

A. I would estimate about three feet.

By Mr. Harrell:

Q. At what intersection did the bus stop to let
page 48 } you off?

A. Fourth Street and Harrison.

Q. That was in the City of Portsmouth?

A. Yes, sir.

Q. When the bus stopped how far was the right-hand front of the bus from the curb?

A. I estimate he was around six feet.

Q. Does the door open to the inside or outside of the bus?

A. I believe that door opens to the inside. It opens to the inside.

Q. When you stepped down from the bus did you look back to the right? I mean as you stepped out of the bus did you look to the end of the bus?

A. Yes.

Q. Did you see anyone coming down there on a bicycle?

A. It is kind of hard when you come to the turn, and when you look, and with a bicycle you could not hardly see it.

Q. Why is that?

A. Your vision is blinded. You can't see anything until you step off the bus.

Q. Which foot did you step off the bus on?

A. The right.

page 49 } Q. When the bicycle hit you where was your left foot?

A. I just stepped off with my right foot and about the time my right foot hit the pavement I was hit from this side with the bicycle and so that ended up in the water.

Q. Was your left foot on the step of the door when the bicycle hit you?

A. My left foot was still in the door.

Q. When your right foot stepped down on the street were you on a dry portion of the street or was there water in there?

A. Dry part of the street.

Q. How far were you from the curb when the bicycle hit you?

John Luther Brock.

A. When the bicycle hit me it knocked me toward the front of the bus and I ended up about the middle way of Harrison Street, where it come out of Fourth Street, to the curb down in the water.

Q Where did the West boy and the bicycle end up?

A. He was right in there with me.

Q In what kind of condition were you as to pain and suffering, and injury, lying in the street?

A. My leg was hurting pretty bad, but I didn't actually think it was broke until they got me up, Jimmy Brammer, and Anderson, they were holding onto me and I page 50 } asked them to let me try to see if I could stand up and try to walk and I couldn't, and they carried me back to the bus and taken me home.

Q. In what way did they carry you?

A. Made a sling between themselves on the shoulder and carried me along like that.

Q. Where did you go from your home?

A. To the hospital.

Q. What type of work do you do at the Air Station?

A. Aircraft mechanic.

Q. What part of the Air Station do you work in?

A. It is the Production Control.

Q. What are your duties?

A. The Production Control is a parts station. We build up kits around the job, carburetor control kits, fuel control kits, etc., going around the job.

Q. Does that require you to move around very much?

A. Quite a bit.

Q. Before the accident how did you move around?

A. Usually with a bicycle.

Q. Have you been able to ride a bicycle since this accident?

A. Not very well. I can ride by using my heel but sometimes it slips off.

Q. Do you use the bicycle at the Naval Air page 51 } Station now?

A. They use them but I don't.

Q. Why don't you use it?

A. Dr. Kirk suggested that I ride the bicycle but I found I could not with actual safety and they told me not to.

Q. How do you move around now?

A. Since I have been hurt I walk.

Q. If you have to go very far how do you get there?

A. We have transportation, but you have to go to them.

Q. Has this injury interfered with your promotion?

John Luther Brock.

A. I couldn't say. It prohibits me from climbing around the planes.

Mr. Ward: That is not responsive to the question. He says he doesn't know.
The Court: I overrule the objection.
Mr. Ward: I save the point.

By Mr. Harrell:
Q. In what way does this injury influence or interfere with promotions in your work?
A. If you have got to climb around on a plane, and it is hard enough to stand up in some cases, even if you have a leg that isn't stiff.
Stiffness in a leg will cause you to fall off, the
page 52 } wind or anything like that. On the assembly lines
you have to climb all over the planes, in the cockpit, along the wings, and the landing gear. There is quite a bit of getting around.
Q. Has this injury affected in any way your private life?
A. In what way?
Q. Things like playing around with the kids?
A. Yes, and playing ball.
Q. Do you have children of your own?
A. Yes.
Q. How does it affect your ability to play with your children?
A. I have three little boys and they like to play ball and I be the catcher, and I can't squat down at all very well.
Q. What other jobs or activity with the children does it prevent you from doing, if any?
A. That's about all.
Q. Is there any playing with the children with games that you couldn't do now?
A. Not that I know of, no, sir.
Q. When you stepped out of the bus was there room enough for the bus to have pulled up to the curb?
A. Yes, sir.
page 53 } Q. How far was the right rear wheel of the bus
from the curb?
A. He was stopped kind of on an angle, maybe seven or eight feet, I would say.
Q. Are you still suffering from this injury?
A. Yes, sir, occasionally.
Q. In what way?

John Luther Brock.

A. It gets swelled up sometimes.

Q Can you bend your right knee as far as you can your left?

A. No, sir, I can't.

Q. What other trouble, if any, have you suffered with your right knee?

A. Well, it is stiff and gets sore and swells up. That's about all.

Mr. Harrell: Answer Mr. Ward's questions.

CROSS EXAMINATION.

By Mr. Ward:

Q. You had had trouble with your knee before this accident when the boy hit you with the bicycle?

page 54 } A. Yes, sir.

Q. You experienced some stiffness at that time, didn't you?

A. Yes, sir.

Q. Dr. Kirk testified the last time that you had been to see him for treatment or for consultation until just before this trial was December 29th, 1958?

According to my calculation, that would be some eighteen months. Did this trial have any influence on your going back to him just a few days before this trial?

A. Actually he never released me.

Q. You didn't feel it necessary to go back to see him for eighteen months until just four days ago?

A. That is right.

Q. Were you influenced in deciding to go back to see him after eighteen months just four days before this trial by the fact that we were going to have this trial and you were going to make claim for damages?

A. Well, he never released me.

Q. That was not my question. I will put it to you another way. Didn't you go back to see the doctor at the suggestion of one or both of these gentlemen sitting here?

A. They asked me to obtain a release.

Q. They asked you to go back to see the doctor just before this trial—

A. —yes.

page 55 } Q. —Didn't they?

A. Yes.

Q. Now, Mr. Brock, when this bus stopped, when Mr.

John Luther Brock.

Simpson stopped at—incidentally, you are still riding with him?

A. Yes.

Q. When he stopped the bus if he had pulled on up to the curb he would have let you out in water?

A. No. If he had pulled up to the curb he would have let me out on the sidewalk.

Q. The water was about even with the curb, was it?

A. (No response).

Q. You say he stopped how many feet from the curb?

A. About six feet, I would judge that.

Q. Did it occur to you or did you feel that that was a dangerous place to stop? Did you have any sensation of that?

A. It is hard to say.

Q. Did you feel it was an improper stop he made at the time you started to get off the bus?

A. Right at that time I didn't, no, sir.

Q. Did you anticipate the bicycle might come around the right of the bus and hit you?

A. No, I didn't.

Q. You didn't see the bicycle, did you?

page 56 } A. No, sir.

Q. I wish you would see if you can recall this: Actually, hadn't the door of the bus closed and had just made a start when you were hit by the bicycle? Hadn't the door closed?

A. I couldn't say. I don't think so. If it had it would have had my foot, because I only had one foot on the pavement.

Q. Did you look to see if anything was going to come up?

A. I looked but vision was obstructed.

Q. You were standing up as you got off the bus?

A. Yes.

Q. And something was there?

A. Yes, the bicycle was there.

Q. You ended up around the corner almost into Harrison Street, didn't you?

A. I ended up right in the intersection of Harrison and Fourth. Actually where it was my feet was just about out from Harrison Street, and the bicycle hit me and knocked me forward, and he rolled down in the water out into the intersection of Harrison and Fourth.

Q. With your back to the bicycle at that time?

John Luther Brock.

A. No. I stepped down with my right foot on the pavement and I was going like this (indicating).

page 57 } Q. If you had one foot on the bus and you put your right foot down, I assume your head was out of the bus?

A. Yes.

Q. If you had looked to the right you could have seen the bicycle, couldn't you?

A. I looked to the right before I stepped down, and after that it was too late.

Q. Did you look as you were stepping out of the bus to see if anything had whipped around the bus?

A. Yes, but I didn't see anything.

Q. But something was there, was there?

A. Yes, sure was.

Q. You were not trying to walk around the puddle of water?

A. No, sir.

Q. Were you going to step right into the water?

A. There was water between me and the curb.

Q. If you had gone around into Harrison Street you could have cleared that puddle of water, could you?

A. I didn't quite get the question.

Q. If you had gone right up on the sidewalk you would have stepped in the water, would you?

A. Yes.

Q. Wasn't it your intention to go around that corner into Harrison Street to avoid the water?

page 58 } A. I had no intention. I was struck as soon as my foot struck the ground. That is the only thing I know.

Q. You testified, I believe, that according to your estimate the right rear of the bus was seven or eight feet from the curb?

A. It was setting at an angle, yes.

Q. Your estimate is it was about seven or eight feet from the curb?

A. That is right.

Q. That is your estimate, seven or eight feet from the curb?

A. Yes.

Q. The front about six feet from the curb?

A. Yes.

Q. You say there were cars parked along the right side of Fourth Street?

John Luther Brock.

A. Yes.

Q So Mr. Simpson had to come in at an angle, did he not?

A. He had to come in at an angle, but he could have come all the way to the curb so I could have stepped off on the curb right on the corner.

By the Court:

Q. If he had done that would the front of the
page 59 } bus have been projecting into Harrison Street?

A. No, sir. He had enough room to come up to the curb, to pull up.

By Mr. Ward:

Q. Would he have had to back the bus up to do that?

A. Yes.

Q. You realized it was not a safe place to get off this bus; is that right?

A. I didn't realize it. I was just hit.

Q. When he stopped was—you are telling us that he stopped—

Mr. Harrell: I object to this. We has been over it two or three times and it is repetitious.

The Court: I think he has covered it.

By Mr. Ward:

Q. You have testified as to the number of feet the rear of the bus was from the curb and how many feet it was from the front.

You say he could have gotten close enough for you to get off on the sidewalk?

A. Yes.

Q. You considered at the time and knew he was
page 60 } making an improper stop?

A. Not at that time.

Q. It was a perfectly normal stop, was it?

A. I don't know how to answer that.

Mr. Ward: I think that is all, sir.

By the Court:

Q. Did the bus have handrails on it to hold onto?

A. No, sir, I don't believe there is.

Q. If there were you didn't catch hold of them?

John Luther Brock.

A. No.

By Mr. Ward:

Q. Isn't it true there is a bar on the left of the door?

A. Yes, sir, I believe there is on the front.

* * * * *

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Mr. Ward: If your Honor please, the defendants move to strike the plaintiff's evidence and enter summary judgment on behalf of the defendants for the following reasons:

Your Honor, the first reasons for my motion is that my contention is there has been no showing of any primary negligence on behalf of the operator of the bus which would be a contributing cause to this accident.

This bus stopped at the corner, according to the testimony of every witness, close enough to that curb so that another automobile could not have come between it and the curb.

Further, I submit any vehicle which attempted at that point to pass the bus on the right would be violating the law. I don't believe that the driver of that bus must page 63 } foresee that one will break the law, or that a bicycle is coming around the right side of the bus at this point when his view if blocked. If there is any statute that has been violated, I don't know what it is.

There has been no showing under Section 46.1-248, and that is the statute which was amended, that would support the allegations in the motion for judgment.

The only prohibition there is that you will not stop on the highway. I submit that only applies outside of the city limits. The amending of that statute is that you should not stop so as to endanger or impede the highway.

There has been no showing by this evidence upon which the jury should be allowed to decide that this bus stopped in a manner to impede or render dangerous the highway.

I call your Honor's attention that in this case only ordinary care is required. The facts proved that this is a contract carrier.

The Court: I recognize the fact that only ordinary care is required. He was only required to exercise ordinary care

unless he falls under the ruling of a common
page 64 } carrier.

Mr. Ward: That is right, your Honor. I want to read from *Cleveland* v. *Danville Traction & Power Company,* 179 Va. 256. I am reading from the syllabus (reading):

The Court held in that case there was no negligence, and this was a common carrier.

The next case I refer to is the *Virginia Electric & Power Company* v. *Thomas,* 180 Va. 292. This involves an accident which arose in the City of Norfolk at City Hall Avenue and Granby Street. At that time Granby Street was not smoothly paved as it is now. It was paved with something like cobblestone (reading):

The next case I will read from is the *Arlington-Fairfax Motor Transportation Company* v. *Thomas, etc.* 188 Va. 796. In this case the plaintiff alighted from the bus some distance from the curb, not at the curb, and she then undertook to walk in front of the bus, and the bus struck her (reading):

Again the action of the trial court was reversed, which allowed the plaintiff to recover, and final judgment was entered. I will read the facts (reading).

The Court: I was wondering as to the ap-
page 65 } plicability of that case to this case.

Mr. Ward: He was let off in the street, and it would not be a question of foreseeability by the bus driver when he let him off that he would walk in front of the bus.

My first proposition is that there is no actionable negligence shown so far as this bus driver was concerned.

I will refer to a recent case involving taxicabs. This is the case of *Eggleston* v. *Broadway-Manhattan Taxi Company.* That is 194 Va. 584.

The Court: Is that the one that the passenger got out on the left side of the car and a woman was hit?

Mr. Ward: Yes, sir. That is the first case, and still following that ruling is the *National Cab Company Inc.,* v. *Bagby.* That is 196 Va. 703. That was in the City of Richmond.

The cab driver pulled the cab up in front of the residence where his passenger had directed him to stop, and he pulled so close to vehicles parked on that side that she couldn't get
out of the cab from the right side.
page 66 } She attempted to open the left door and could
not do so. The cab driver was writing his manifest.

She said she could not open the door and he reached around and opened the door for her and before she got out of

the cab another vehicle strikes the cab and injures her hand.

The plaintiff was allowed to recover in the lower Court and judgment was entered on the verdict, and the Court of Appeals, following the Broadway-Manhattan case, denied her recovery.

A petition for a re-hearing was awarded and the Court of Appeals stuck to its original ruling (reading).

Now, how can the plaintiff in this case say the driver saw that which he didn't see, himself?

The statute requiring a vehicle not to be stopped or impede traffic on the highway is not applicable to this case, because there has been no evidence showing the highway had been impeded and rendered dangerous.

The plaintiff can't apply one rule to himself and another to the driver. He said he looked and evidently
page 67 } the bicycle was there, and the familiar rule is if you don't look effectively it is as if you didn't look at all.

I say the plaintiff is barred by his own negligence to recover because there has been no showing of any negligence on the part of this driver, and I move the Court to strike the evidence and enter summary judgment for the defendant.

Mr. Harrell: The plaintiff himself testified he looked and couldn't see anything because his view was obstructed by the seats and windows. He had gotten one foot on the ground when the bicycle hit him. If the bus driver could not see it, the plaintiff couldn't.

Mr. Ward states that these statutes do not apply because it is in the city and not out in the country. Let me read from Title 46.1-48, which has to do with safety statutes, and provides, Number one, that no vehicle shall be stopped in such manner as to impede the use of the highway except in cases of emergency. Therefore, there is only one situation in which you are allowed to stop a vehicle in such manner as to impede the use of the street by someone else. That was not in this case.

page 68 } The boy testified that the bus was so close, the back end of the bus, so far out, that he could not go around without crossing the white line.

Mr. Ward: He testified he intended to turn right.

Mr. Harrell: The statute requires that a vehicle shall be stopped parallel to the right-hand edge of the curb of the roadway.

Every single witness has testified the bus stopped at an angle, and placed the front of the bus from six to eight feet away.

This bus didn't pull up to the right-hand curb of the roadway and didn't stop parallel to it, but at an angle with the back end sticking out in the street.

He could have left the travelled portion of the highway with safety. He could have pulled up a little further and gotten the back end away from the travelled portion and not with the back end in the middle of the street as he did.

I would say the boy was not guilty of any negligence.

If the defendant had not had his bus, the rear
page 69 } end, sticking out in the street, the boy could have
gone around him in safety. That is the negligence
the man is guilty of.

Let me read to you from *Birtcherd Dairy* v. *Edwards*. It is 197 Va. 830.

In this particular case the truck was stopped partly on the travelled portion of the highway and another truck came along and passed it heading in the same direction. As it pulled over to the left to pass a child ran out from between parked cars and the driver killed it. We are involved with the same statute (reading).

The Court said it was a matter for the jury.

In the case of *Davis, Administratrix,* v. *Scarborough,* the Court had this to say (reading).

Mr. Ward has stated that any vehicle would violate the law to go on the right-hand side of the bus. I agree with him, but it would not excuse the defendant from his negligence.

He violated the law in the way he stopped that bus.

He has cited a couple of bus cases, one where it was in an unsafe place. That was an unsafe place. That was an entirely different situation from this. That was a bus
page 70 } operated by a regular transit company. This bus
was required to stop at particular bus stops, not
anywhere else, and if they did they violated the law.

In the instant case this bus driver could have stopped anywhere he wanted to. He was not required to stop at any place except it must be a safe place.

The V. E. P. against Thomas was the same situation. That was an old case. The statutes were not in effect. That was a common carrier case where the passenger was injured in a hole on the street. That is not the situation here. We are not claiming that there was anything faulty with the street.

I say this defendant has violated every single one of the statutes, I think, and all we have to prove is one. Whether he has violated them, or not, is a factual matter to be determined by the jury and not by the Court.

Mr. Ward: Taking the plaintiff's testimony, he said as he stepped off the bus he was hit by the bicycle, and the bicycle

had to be there, and if he had looked he could not have missed seeing it.

page 71 } I submit he is certainly guilty of contributory negligence even if the Court should say, and I don't know where the evidence would come from, that the defendant had impeded or rendered dangerous the use of the highway.

In the Birtcherd Dairy case the facts were entirely different. The bakery truck was stopped on the highway and there was a second truck parked partially on the highway, and the Birtcherd Dairy truck went to the left and then struck the child. The testimony was the truck went completely off the road and hit the child.

The Court: I overrule the motion.

Mr. Ward: Exception.

GUY P. SIMPSON,

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

page 72 } DIRECT EXAMINATION.

By Mr. Ward:

Q. State your name, please?

A. Guy P. Simpson.

Q. Where do you live?

A. 204 Mount Vernon Avenue, Portsmouth.

Q. What is your occupation?

A. Naval Air Station employee, metalsmith at the Naval Air Station.

Q. Do you also operate a bus for Mr. and Mrs. Finck?

A. Yes.

Q. Were you operating the bus on which Mr. Brock was riding on December 20th, 1957, when he was injured?

A. Yes, I was.

Q. I believe you were proceeding generally south on Fourth Street?

A. That is correct.

Q. What time was it?

A. Between twenty to and five.

Q. It was your intention to stop where?

A. On the corner of Harrison and Fourth, which

page 73 } was the same corner I always put him out on.

Q. Were there any vehicles parked on the right-hand side of Fourth Street heading toward the corner?

Guy P. Simpson.

A. There were vehicles parked practically to the curb right on up from one car length from the corner.

Q. Your estimate would be one car length?

A. Yes.

Q. What were the weather conditions?

A. It had been raining that day and was still drizzling rain. There was water almost up to the curb.

Q. How high would you say the water was at that corner?

A. I would say practically up to the curb. It is really a high curb and the water was at least shoe deep.

Q. Was it possible with the cars parked as you described them, for you to pull the bus up practically to the curbline?

A. No, sir, it was impossible. I had to park it at an angle.

Q. When you parked at the curb, how far would you say the front of the bus was from the curb?

A. To the best of my estimation, approximately two and a half or three feet.

Q. Were you attempting to let Mr. Brock off at a dry spot?

page 74 } A. It was fully my intention because there was water in the curb and it was deeper.

I wanted to put him off at a dry spot as near the curb as I could.

Q. Before you were aware that he had been struck by this bicycle, had you closed your door and started off with the bus?

A. I had closed the door and was looking through my side mirror to see that Fourth Street was clear before I pulled off to continue.

Q. How far did you get before you were aware that the bicycle had struck Mr. Brock?

A. The front end of the bus was approximately halfway across Harrison Street.

Q. Did you ever see the bicycle come out behind you?

A. No, sir.

Q. When you found out Mr. Brock had been struck, what did you do?

A. I opened the door as quick as I could, and two fellows, Mr. Anderson, and Mr. Brammer, they jumped off ahead of me.

We all three got out and helped Mr. Brock up and the boy on the bicycle, too. The boy on the bicycle and Mr. Brock were down in the water out there at Harrison Street.

Guy P. Simpson.

Q. You helped put Mr. Brock back on the bus?

page 75 } A. Yes, Mr. Anderson, Mr. Brock and myself put him back.

It is hard to have too many men around an injured person.

I got back on the bus at that time and backed it up to near Harrison Street before we put him back on the bus.

Q. Did you take him home then?

A. Turned to the left on Fifth Street and took him in the house.

Q. How long have you been driving this bus going to and from the Naval Air Station?

A. I have been driving the bus approximately nine and a half years.

Q. Could it have been possible for an automobile to come up on the right side of your bus without going up on the curb?

A. It would have been impossible.

Mr. Ward: Answer Mr. Harrell's questions.

CROSS EXAMINATION.

By Mr. Harrell:

Q. How deep was the water there at the curb?

page 76 } A. As I say, it is hard to judge. It was not right at a level at the curb, but was over shoe deep a foot from the curb.

Q. How far did it run out in Fourth Street from the curb?

A. I would say probably—where I put him off the water was approximately, maybe a foot and a half out from the curb and then it runs out because there is a dip there.

Where the front door was and where this water came up it was a foot and a half from the curb.

When I put him out of the bus he had clearance to step off on a dry pavement and get around the water.

Q. If the water was that deep, isn't the street constructed so the water extended out approximately six feet in the street?

A. Six feet in the street, no.

Q. Have you ever been back to check it?

A. I have been around there a few times.

Q. You haven't checked the intersection to see how far the water would have gone out in the middle of the street?

A. I never have measured it.

Guy P. Simpson.

Q. You say you stopped the bus approximately two and a half feet from the curb?

A. About two and a half to three feet.

page 77 } Q. If it was that close to the curb the bicycle couldn't have gotten between the bus and the curb, coult it?

A. It could come in from the back end. There was room enough for a bicycle to come in between there.

There was plenty of room to come in between the back end of the bus, and if the door was two and a half feet from the curb the front end would have been still further toward the curb and there would have been enough room for the bicycle to get through there.

He had room enough to get in between the curb and the side of the bus.

Q. Your estimate is it was three feet from the curb?

A. Two and a half or three feet.

Q. It could have been further?

A. You can't get right down to half inches in a thing like that, but I gave a rough estimate.

Q. If other witnesses said it was further, would you say they were wrong?

Mr. Ward: I object to that, your Honor.

The Court: I sustain the objection. He is not required to pass on what other witnesses say.

By Mr. Harrell:

Q. You didn't look in the rear view mirror as

page 78 } you came to a stop, did you?

A. I have a mirror on the left side, a rear view mirror on the left side of the bus. This bus, due to the way the door is constructed, you can have a right-hand side mirror and an inside mirror, and we can look out the back of the bus on the right-hand side windows due to the construction, and you can have another rear view mirror.

Q. You didn't look out through the left rear view mirror, did you?

A. Yes, I had before I started up.

Q. I mean before you stopped?

A. When I am driving and pull up to the curb to put someone off, I don't look through the rear view mirror because when I pull to the curb I am looking out ahead.

Q. You were looking at the curb?

A. I am looking at the curb, but when I pull out I look at

Guy P. Simpson.

the left-hand mirror to be sure the street is clear, and then I pull out again.

Q. How far out in the street was the back end of the bus?

A. The back end of the bus was probably a car's width. There was room enough for the boy to come in between the car and the last car parked.

The side of my bus, I would say, the back end of it from that car was maybe three or four feet.

page 79 } Q. Using this book as an illustration, this is the curb here and you say there was an automobile here (indicating) and the bus was setting out at approximately a 45 degree angle with the back end of the bus three or four feet from the automobile, and that would put the bus almost 25 or 30 feet in the street?

A. Not that far from the curb.

Q. I am talking about at the back, the rear end, of the bus. If you have the width of an automobile here there would be three or four feet in here, and then you have the bus sticking out on an angle which would put the back end of the bus almost in the center of the street, would it?

A. I couldn't exactly say. I don't know how wide Fourth Street is. I wouldn't say it was that far.

Q. It would be close?

A. It is hard to say how far the left rear of the bus was in the street.

Q. You judged the distance from the front end of the car to the curb as you drove up?

A. Yes.

Q. You didn't check the distance after you got out, did you?

A. Not during the confusion of getting Mr. Brock up, no. I didn't check exactly the situation of how far the bus was from the car parked there.

page 80 } Q. The distance you judged, looking at it from the curb, you judged while you were sitting in the driver's seat?

A. I am estimating that.

Q. You estimated it while you were sitting in the driver's seat?

A. No, while I was helping to get him up.

Q You had moved the bus after you got outside?

A. That is correct, and I was thinking of how close I was to the curb all the time.

Guy P. Simpson.

Q. You were thinking about how far away from the curb you were?

A. I said one time I didn't put him off on the sidewalk. I estimated the distance to the best of my recollection and said exactly where I put him off. I never at any time said I put him off on the sidewalk because I didn't.

Q. You could have put him off on the sidewalk, could you?

A. I couldn't have with the car, the last car parked there.

Q. You could have driven your bus up a little further forward?

A. I would have been in Harrison Street.

Q. You could have driven up a little further?

A. I would have put him off in Harrison Street
page 81 } then and not on the sidewalk.

Q. You could have turned a little sharply in, could you?

A. When you are driving a long vehicle like that you can't put your distance too close or you are going to hit something.

Q. That is your estimate from driving a long vehicle?

A. Yes.

Q. If you had turned sharply to get to the curb, would you have hit the automobile?

A. I probably would.

Q. You still say it was at least one car length from the front end of the automobile to the point where you let Brock off?

A. Approximately.

Q. You couldn't have turned in with that car there?

A. Not when the car was there.

Q. Did you think it was your duty to put him off in a dry spot out there in the street?

A That is correct.

Q. So you could have pulled up closer to the curb so he could have stepped from the bus to the curb?

A. No. I told Mr. Ward that due to the fact I couldn't pull up to the sidewalk that I was trying to put him
page 82 } off in a dry spot.

Q. You stop your bus at different intersections wherever you want to let passengers off, do you not?

A. They have regular stops, most of them.

Q. You are not required to stop at any particular intersections to take on or discharge passengers?

A. No.

Guy P. Simpson.

By the Court:

Q. (Interposing) Are you required by the City Manager or by law to stop at a particular stop?

A. No, sir.

By Mr. Harrell:

Q. If you could not have put him off at the curb you could have gone down further, further down the street, where you could have, could you?

A. Yes, I guess so, but I wanted to put him off where I had been putting him off.

Q. He lives a very short ways from the intersection, does he?

A. I could have put him off at the next corner probably, but maybe the same thing would be there.

Q. You don't know that for sure?

page 83 } A. I couldn't say for sure, because I don't know—I can't remember the circumstances on the other corner.

Q. You didn't look to see if there were cars at the other corner, did you?

Mr. Ward: I object to that. It is totally immaterial.

The Court: I sustain the objection.

By Mr. Harrell:

Q. If you had put him off at the other corner he would still have been as close to home as where you put him off?

A No.

Q. He lives midway of that block?

A. He don't live quite midway of the block.

Q. How far does he live from the corner?

A. He lives from the corner of Harrison and Fifth Street, and it is the fourth house down.

Q. The fourth house down from Harrison Street?

A. Yes.

Q. Toward the next corner from where you let him off?

A. Yes.

Mr. Harrell: That is all.

page 84 } RE-DIRECT EXAMINATION.

By Mr. Ward:

Q. Is that where you customarily let him off?

Guy P. Simpson.

A. Yes.
Q. Is that where he requested that he be let off?

Mr. Harrell: He is not only leading the witness but is testifying, and I object.
The Court: He hasn't suggested an answer to him.

(The last question was read as follows):

"Q. Is that where he requested that he be let off?"

Mr. Harrell: There has never been any testimony that he requested where to be put off.
The Court: I think it is a proper question.
Mr. Harrell: I object to leading.

By Mr. Ward:
Q. At what corner did he request to be put off; where did he ask to be put off?
page 85 } A. At the corner of Harrison and Fourth where I always put him off.

Mr. Ward: That is all.

RE-CROSS EXAMINATION.

By Mr. Harrell:
Q. He didn't ask you that particular day to put him off there, did he?
A. No, not that particular day.
Q. He had asked you sometime previously, and it was customary for you to put him off at this corner?
A. That was the customary corner to put him off.

By Mr. Ward:
Q. Was there any protest made not to put him off there at that corner on that day?
A. No.
Q. He voluntarily got off there, did he?
A. Yes.

Mr. Harrell: That is a leading question.
The Court: I overrule the objection.

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page 96 }

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(Court and counsel retired to chambers).

Mr. Ward: If your Honor please, I renew my motion to strike the plaintiff's evidence and enter summary judgment on behalf of the defendants, and I assign the reasons for that motion as the same which I previously assigned when the motion was first made.

The Court: I overrule the motion.

Mr. Ward: Exception.

(The instructions were argued).

page 97 } OBJECTIONS AND EXCEPTIONS TO INSTRUCTIONS.

Mr. Ward: The defendants except to the granting of Instructions A and C on the grounds that said instructions are pure abstract statements of the law which are inapplicable to the facts and circumstances of this case.

Said instructions give the jury no standard upon which to arrive at a conclusion and as given would allow the jury to speculate as to the standard of care owed by the defendants to the plaintiff.

Under these instructions the jury could, in effect, hold the defendants to the standard of care owed by an insurer for these instructions permit the jury to use hindsight in determining whether or not the defendants were guilty of negligence, and said instructions ignore the test of foreseeability which is an essential ingredient of negligence.

The defendants object and except to the granting of Instruction B for the following reasons: Paragraph 4 of said instruction is erroneous because there was no evi-
page 98 } dence of humiliation or embarrassment upon which the instruction could have been based. Paragraph 5 of the instructions should have included only expenses incurred for doctors' and hospital bills which were the only items of damage in evidence.

Paragraph 7 of Instruction B is erroneous because there was no evidence that the plaintiff could reasonably expect to lose any earnings in the future as a result of this accident. There was no testimony that with the disability given him

by Dr. Kirk that he would be unable to perform his usual and regular occupation.

A further exception to Instruction B is to the last phrase, "Not to exceed the sum sued for in the motion for judgment." This is erroneous for it singles out to the jury by the Court the amount of money sued for.

The defendant objects and excepts to the action of the Court in granting Instruction D on the grounds that the use of the word "excuse" in said instruction is misleading.

This instruction is in improper form, and the instruction should have been in the form that if the defendants' negligence concurred with that of the bicycle rider, then the defendants could be held liable.

* * * * *

A Copy—Teste:

H. G. TURNER, Clerk.

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