that the one which struck the wagon was coming could not be readily seen until the persons on the street were within 20 or 30 feet of the rails forming the railway track, and the evidence was clearly such that it required the court to submit this charge of negligence to the jury, and in the judgment of the court the finding of the jury that the crossing was of such a nature that a flagman ought to have been stationed thereat finds ample support in the evidence. The contention of counsel for the railway company that, owing to the ruling of the court that the negligence of the driver of the wagon could not be imputed to the child, the jury might not have rightly apprehended the real issue submitted to them, and might have construed the charge to mean that the jury could not attribute the happening of the accident to the action of Kowalski, as driver of the wagon, and, so construing it, might have assumed that they were not at liberty to find that the accident was not due to negligence on part of the railway company, but was caused solely by the negligence of Kowalski, in driving heedlessly upon the track, has certainly much of plausibility to sustain it; yet it is certainly true that the court did not so instruct the jury, and it cannot be assumed that the jury failed to understand the charge that was in fact given. The jury was expressly instructed that the case against the railway company was based upon the charge of negligence; that merely proving that a collision occurred between the train and the wagon at the crossing would not make out the case against the defendant; that it must be shown that the railway company had been negligent, and that its negligence was the approximate cause of the accident; and then the attention of the jury was called to the particular charge of negligence which was submitted to them, to wit, the question whether the crossing was of such a nature that, in the exercise of ordinary care, the railway company ought to have kept a flagman thereat; and, further, that, even if they found that a flagman ought to have been kept at the crossing, they could not find against the company, unless they also found that the failure to have a flagman was a proximate cause of the accident, or, in other words, that the relation of cause and effect must exist between the negligence and the accident. If the finding of the jury on this question was clearly against the weight of the evidence, that fact might be relied on as evidence that the jury had in some way failed to properly construe and apply the instruction given them; but, as already said, the finding of the jury is in accord with the evidence, and is sustained thereby, and the court cannot assume that the jury misunderstood the charge of the court on this branch of the case.

The next contention is that, even if it be admitted that the crossing was of that character that it required the presence of a flagman thereon to give due warning to persons upon the highway of the approach of railway trains, nevertheless the facts show that the absence of a flagman had no connection with the accident; that the parties in the wagon took no notice of the other warnings that were given; and that the action of the driver of the wagon was such that it proves that he simply entered into a race with the approaching train in the effort to pass over the crossing before the train reached it; and that the pres-

ence or absence of a flagman could have no connection with the accident. The testimony of the persons in the wagon was to the effect that they did not see the train until the horses' heads were within a few feet of the railway track. The testimony of all the defendant's witnesses was to the effect that, when the horses were close to the track, the driver threw up the reins in the apparent effort to stop, and then dropped them, apparently for the purpose of urging the horses over the crossing. This evidence clearly tends to support the testimony of Kowalski and his wife that they did not see the train until they were nearly on the track. Mrs. Kowalski testified that the horses' heads were about six feet from the rails when she first saw the train, and other witnesses estimated the distances when the driver checked up the horses at from a few up to about 10 feet. The persons in the wagon must therefore have been fully 20 feet from the track, or at about the point where it first becomes possible to obtain a view for any considerable distance up the track, and therefore the evidence tends to show that they did see the train at about the place where a good view up the track could be had. The negligence chargeable against the adults in the wagon is that knowing the nature of the crossing, and the impossibility of seeing any distance up the track, until they had reached a point so close to the track that the horses' heads would be within from 6 to 10 feet of the rails, they drove down to the crossing at a smart pace, without halting or slowing up the speed of the horses in order that they might properly exercise their senses of sight and hearing, and the jury properly found that there was negligence on part of Mrs. Kowalski that would defeat any right of recovery on her part. The fact, however, that they failed to see or hear the coming train, or the signals given by gong or bell, does not prove that they would also have failed to see and hear the signals given by a flagman had one been stationed at the crossing. He would have been right on the crossing, in plain sight of the persons in the wagon, long before they reached a point of danger. His signals, if he properly performed his duty, would in all probability have been seen and understood by the occupants of the wagon, and thus they would have received a warning of danger in season to have avoided it without risk to themselves. By the finding of the jury in this case it is determined that, for the proper protection of persons lawfully using the highway crossing in question, the duty was imposed upon the railway company of having a flagman thereat to give warning of the approach of its trains. It is admitted that there was no flagman at the crossing at the time this accident happened, and thus it is shown that the plaintiff in this case was subjected, in using the crossing, to all the additional hazards and dangers resulting from the failure to keep a flagman thereat, and the evidence was such as to justify the finding that this failure, constituting negligence on part of the railway company, aided in causing the accident and the resulting injuries to the person of the plaintiff.

The last point presented by the motion for a new trial is that the amount of damages awarded, to wit, $2,000, is excessive and not warranted by the evidence. The testimony on behalf of the plaintiff tended

to show that the child received a blow on the head; that there is a slight displacement of the parietal bone on one side of the head; that for some weeks after the accident the child's neck was twisted to one side; that, while the child can now readily turn his head in any direction, there still remains a slight atrophy of the muscles on one side of the neck, creating a tendency to carry the head slightly drooped; that since the accident the child has been subject to spasms, which did not exist before the accident; and that, if these result from the injury to the head, they may develop into a serious form. The testimony on behalf of the defendant tended to deny the existence of these injuries, and to minimize the effects thereof. This conflict in the evidence it was the province of the jury to consider, and to determine what the evidence established with regard to these particulars. If the evidence adduced by the plaintiff is accepted as a fair statement of the injuries actually caused the plaintiff, then it cannot be said that the verdict is so excessive in amount as to justify the court in interfering with the finding of the jury on this question, and it was clearly within the province of the jury to determine whether the evidence on behalf of the plaintiff on this question exceeded in weight that adduced by the defendant. The motion for new trial is therefore overruled, and judgment will be entered in favor of the plaintiff in accordance with the verdict of the jury.

COLUMB v. WEBSTER MFG. CO.

(Circuit Court of Appeals, First Circuit. January 3, 1898.

No. 200.

JUDGMENT—RES JUDICATA—IDENTITY OF CAUSE OF ACTION.

A judgment on the merits in a state court, in an action to recover for a personal injury on the ground of negligence, is a bar to a second action in a federal court by the same plaintiff against the same defendant to recover for the same injury, and grounded on defendant's negligence in respect to the same occurrence, though additional acts of negligence are charged.

In Error to the Circuit Court of the United States for the District of Massachusetts.

This was an action for personal injury, brought by Frank Columb against the Webster Manufacturing Company. The circuit court sustained a plea of former adjudication, and the plaintiff brings error.

John L. Hunt, for plaintiff in error.

Richard M. Saltonstall (H. Eugene Bolles, on the brief), for defendant in error.

Before COLT, Circuit Judge, and WEBB and ALDRICH, District Judges.

ALDRICH, District Judge. This is an action to recover for damages which the plaintiff claims he sustained by reason of the defendant's negligence in New Hampshire. The plaintiff brought a prior