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James C. Knight and Beatrice M. Knight v. Utah Power & Light Company and Ogden River Water Users Association : Brief of Respondents

Utah Supreme Court

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No. 7161

IN THE

SUPREME COURT

OF THE STATE OF UTAH

JAMES C. KNIGHT and BEATRICE M.
KNIGHT,

Plaintiffs and Respondents

vs.

UTAH POWER & LIGHT COMPANY, a
corporation and OGDEN RIVER WATER
USERS ASSOCIATION, a corporation,

Defendants and Appellants.

Brief of Respondents

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J. O. WOODS PRINTING CO., OGDEN, UTAH

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RESPONDENTS' SUPPLEMENTAL STATEMENT
OF FACTS

As we believe appellants' statement is insufficient to a proper understanding of this case we are under the necessity of supplementing it. Here, as in appellants' brief, the respondents and appellants will be respectively designated plaintiffs and defendants.

The pipe line here involved was constructed pursuant to a three party contract (plaintiffs' Exhibit B, T. 131) between the defendants and the United States of America. The contract provides that the new pipe be constructed on the Power Company's R. O. W. and "to the alignment and grades of the Company's present

pipe line,” and that “in general, the new wood stave pipe line, where placed on the original located line, will be buried in the same manner as the present pipe line of the Company.” (Exhibit B, paragraph 5, and contract “Exhibit B” thereto attached.) All plans were subject to the approval of the Power Company. (Ibid.) and work was to be done to its satisfaction. Defendants, under the contract, operated and maintained the new line jointly. (Ibid., paragraph 17.)

Experience over the past thirty-five years (as far back as the recollection of any witness goes) is that frequently in Ogden Canyon, especially at the time of the spring thaws, rocks and boulders on the sides of Ogden Canyon are loosened by the forces of nature and particularly by the action of moisture freezing and melting in rotation, and roll down the canyon side across the pipe line situs to the bottom of the canyon. These vary in size from small pebbles to great boulders of many tons mass. (Tr. 19, 20, 22, 23, 26-29; 31-36, 37.) Plaintiffs produced evidence that *this pipe* and also the one it replaced had been broken in this vicinity by rolling rocks on several previous occasions and at least once before at substantially the same spot. (Tr. 22, 23; 26-29; 35, 36.) On one such occasion the resulting flood flowed down the road more than a thousand feet. (Tr. 39).

Moreover, a parallel pipe line maintained by Ogden City for many years was subject to frequent breaks in the exposed portions from rocks rolling down the canyon side. (Tr. 31-36.) In 1933, three years before Defendant’s new pipe was built, the city’s old surface pipe was replaced with a new 38” pipe which was buried

from one or two feet below the surface of the ground. Thereafter, although rocks still rolled across this pipe, no further trouble with such breakage has been experienced. (Tr. 44-46, 48.)

The engineer who planned the Defendants' new pipe gave consideration to these dangers, but the use of available safety precautions, such as burying the pipe or using steel pipe, was limited because of the increased cost to defendants of such precautions. (Tr. 147, 148.)

On the night of the break and the resulting flood Mr. J. W. Farrell, who drove up the canyon between 6:30 and 7:00 p.m., was the first to see the trouble. (Tr. 158-9.) He met the water about 1,000 feet below the break, drove straight through (against the current) and without stopping proceeded to the dam to get the water turned off. He does not mention seeing the rock 8½ feet long and 5 feet high which other witnesses who arrived later saw in the middle of the road. (Tr. 180, 183, 184, 230.) Neither does he mention meeting Mr. Edward Jespersen, who, driving *down* the canyon (with the current) was stalled at the upper edge of the flood in water 1½ feet deep at first, but which rose over the cushions of his car before the water was stopped. *He was stalled only 30 or 40 feet west of the Canyon Grocery.* (Tr. 24.) The break apparently caused by the large boulder which came to rest in the road *was 300 or 400 feet west of the Grocery.* (Tr. 219) About 100, 150, or 200 feet east of this break, where the pipe was not covered at all, two other smaller rocks had hit the north side of the pipeline and were found beside it. Defendants' employees testified that they "had broken a little hole" (Tr. 182; 237) from which (on the following morning) no water was flowing. (Tr. 182.)

Two days after the flood Mr. Henry G. Allred and a companion traced its course up to that hole by the debris and other marks left by the water as it flowed down the canyon to Plaintiffs' house. They found a hole 3 or 4 feet long and 2 feet wide, with evidence of extensive water flow, and two boulders, each about 2x2x3 feet in size lying beneath the break. (Tr. 60-63) (It is Plaintiffs' contention that this break came first and caused the damage and that the break emphasized by defendants came some time later.) He found two tracks, apparently of the course of the boulders, running down the mountainside to the place of this break. (Tr. 64, 65.) At this point the pipe is low, but west of there (down-canyon) it raises to go over a hump, so that this point would be under pressure.

At the time there was some snow banked on either side of the road by the snowplows of the State Road Commission, but not so much as shown by defendants' photographic exhibits taken the following year. (Tr. 73-74.) However, this was the normal condition of the road in winter; it was common knowledge, and Defendants knew that this road was ploughed out every winter. (Tr. 245-246.)

According to the contract Exhibit B (second page of "Exhibit B" attached thereto) the designed capacity of the pipeline is at least 320 c.f.s.; although Mr. Jones, the Power Company's superintendent, said it was 280 c.f.s. (Tr. 255.) At the time of the break it was carrying about one-half its capacity. (Tr. 255.)

Plaintiffs' complaint as amended alleges negligence (1) in constructing such a pipe on the surface of the ground unprotected from the known dangers of rolling

rocks and (2) in flowing large quantities of water through the pipe so unprotected. (R. 002-003.) Although negligence in maintenance was also alleged, the court submitted the case to the jury only on the questions of negligent construction and operation.

It should be noted that defendants' quotation (on page 15 of their brief) of the court's Instruction 9 is erroneous: the words "and maintenance" are not contained in the instruction. (R. 062; Tr. 286.)

THE ARGUMENT

This case was presented by the respondent-plaintiffs and tried by the lower court upon general principles of negligence under which human beings are bound, in the conduct of their affairs, to use reasonable care to avoid injury from dangers which a reasonably prudent man would have foreseen. The trial court submitted the case to the jury on instructions based on the decisions of this court carefully defining the duties and standards of care required of defendants in accordance with these general principles. By its verdict the jury in effect found that a reasonable prudent man would, under all the circumstances, have foreseen the danger which in fact materialized, and that defendants failed to take reasonable precautions to avoid damage to the plaintiffs resulting therefrom, and further, that the damage resulted naturally and proximately from that failure. As there is ample evidence in support of every fact necessary to the verdict, and the case is one at law, the verdict should not be disturbed. We will, however, answer in order the four points raised in the Appellants' brief:

1. *The lower court did not err in overruling defendants' demurrers, in denying defendants' motions for non-suit following plaintiffs' opening statement, or in denying defendants' motions for non-suit following completion of plaintiffs' case in chief.*

The defendants, in the first section of their brief, attack the sufficiency of the alleged and proved facts to spell out negligence.

However, it is alleged that defendants were negligent (1) in so constructing the pipe upon the surface that it was exposed to rolling rocks which every spring roll down the canyon side without protection from such rocks, and (2) in coursing large quantities of water through the pipe when it was so unprotected. It is also alleged that the defendants knew, or by the exercise of reasonable care should have known of such rolling rocks. These allegations of course state in general terms the factual basis of legal negligence unless this court is going to hold that power and irrigation companies are entitled as a matter of law to course large streams of water to ~~escape from its confining pipe with disastrous~~ *along a mountainside without regard for* normal forces of nature which are likely to cause the water to escape from its confining pipe with disastrous results. We submit that is not the law, and we are confident the court will not so hold. Defendants are bound so to use their property that their neighbors will not be injured as a result of defendants' failure reasonably to provide against foreseeable hazards.

The evidence, although not entirely without conflict, amply supports the allegations. Certainly the escape of the water from the exposed pipe, with resulting damage, was foreseeable by anyone, especially in the light

of past experience. There was evidence that *this pipe* had been previously (and since 1936) broken (T. 23) and that the pipe which preceded it, and which was owned and operated by the defendant Power Company, had been broken at about the same spot, all by rolling rocks. (T. 26-29). Moreover, the evidence showed without conflict that Ogden City's parallel pipe-line had frequently suffered similar breaks from the same cause, until, some years prior to the construction of the defendants' pipe, the city's pipe was buried from one to two feet, since when no farther breaks have occurred. A reasonably prudent man, we submit, would have profited by the city's experience, and protected his neighbors against the hazard of a tremendous flow of water on the side of a steep canyon when he knew that rolling rocks had already broken similar pipelines on many occasions. Such dangers were in fact foreseen, but were ignored to save money. (Tr. 147-148). Surely it is not unreasonable to require the defendants here to meet, in their pursuit of business profit, the same standard of care as Ogden City found it necessary and convenient to meet. To permit defendants so to save money and profits at plaintiffs' expense, would, we submit, amount to a taking of plaintiffs' property without due process of law and without fair compensation in violation of the Constitution of the United States, Amendment XIV, Section 1, and the Constitution of Utah, Article I, Section 7 and Section 22. To knowingly expose plaintiffs' property to so obvious and great a hazard as that here existing certainly depreciates its value immediately, and sooner or later results in its damage and partial destruction. If defendants wanted, for reasons of economy, to

impose this risk on plaintiffs' land without liability, they should have condemned it, so that they could flood it with impunity after paying the value of the land.

We think it fair to point out that in comparing the situation of the defendants and Ogden City the standard of care and the efforts reasonably to be required of defendants to avoid injury to their neighbors was even higher than that reasonably to be required of the city. The degree of care required is, generally speaking, graduated according to the danger attendant upon the acts performed or instrumentality used, and the greater the danger the greater the care and vigilance required to avoid injury.

38 Am. Jur. 677, "Negligence," Section 31;

Mackay vs. Breeze,
72 Utah 305, 269 Pac. 1026, 1027.

In this case the capacity of defendants' pipe line was approximately four times that of the city's pipe; the potential flood was four times as great. Hence the degree of care required of defendants would be substantially greater than that required of the city. It would be reasonable to require defendants to assume a much larger financial burden in the interest of safety.

It would seem clear that under all the circumstances it was negligence for defendants to course 140 c.f.s. of water through the unprotected pipe, at least during the season when rolling rocks were to be expected, and the submission of the case to the jury was fully justified. Such rocks were to be anticipated in the ordinary course of nature, and when defendants undertook to run a tremendous flow of water down the canyonside for their

own purposes, they were under a duty to construct and operate the means of accomplishing their purpose in a way which would adequately meet and cope with such natural emergencies.

Jordan v. City of Mt. Pleasant
15 Utah 449, 49 Pac. 746

Lisonbee v. Monroe Irrigation Co.
18 Utah 343, 54 Pac. 1009.

In the latter case this court carefully and clearly outlined the law of Utah applicable to such situations, and the trial court here followed that law.

Defendants rely upon the case of Logan, Hyde Park and Smithfield Canal Co., v. Utah Power and Light Co., 45 Utah 491, 146 Pac. 560. It is true that the situation there was much like the situation here, and that it was held that there was no liability there. However there are material and vital differences in the facts there and here which make that case inapplicable to the case at bar. We shall consider them briefly.

First, then, in the case cited the rock in question was proved to have been started down the mountain by a human agency, by “some person or persons who were strangers to the defendant”—clearly a negligent act. Here it is conceded that the rocks involved were started by the usual and normal forces of nature. “It can be stated as a general rule that ordinarily the intervention of a *negligent act* as the independent and efficient cause of an injury operates to relieve one who has been guilty of prior negligence from responsibility for the injury, *notwithstanding the condition under which the intervening cause operated was created by the prior negligence.*” (Italics added.)

38 Am. Jur. 729, "Negligence" § 72.

Thus the defendant in the cited case was not bound to foresee that a human being would break its flume by negligently rolling a rock upon it. In this case, however, the defendants under all the circumstances were bound to foresee that rocks loosened by the forces of nature would be likely to strike and break their unprotected pipe. It had happened repeatedly before. "The view that wher a natural force or act of God unites with human negligence in causing injury the negligence of the human agent is regarded as a condition, and not as a cause of the injury, *is disapproved generally. The general rule* is that when the negligence of a responsible person concurs with an ordinary flood, storm, or other natural force, or with a co-called act of God, in producing an injury, the party guilty of such negligence will be held liable for the injurious consequences, if the injury would not have happened except for his failure to exercise care." (Italics added.)

38 Am. Jur. 719, et seq., "Negligence" § 65.

Secondly, in the Canal Company case cited by defendants there was no evidence that rolling rocks had ever before broken the pipe or flume there involved. In this case the evidence was that this pipe and its predecessor and a parrallel pipe had been repeatedly broken by rolling rocks, but that the parallel pipe suffered no further damage from rocks after it was buried. The background of experience in Ogden Canyon, the circumstances against which the foreseeability of injury must be tested in determining negligence, is in this case exactly the opposite of that in the cited case. Here there was even evidence of a previous break *at this par-*

ticular point. Has this no bearing on foreseeability? The opinion in the previous case was based in large part upon consideration of the fact that no previous difficulty had been experienced. The proving of the contrary fact here is sufficient alone to distinguish the cases on their facts.

Thirdly, Ogden Canyon is heavily populated, with almost all available level space occupied by human habitations, while Logan Canyon in 1913 and earlier had practically no population especially in the early spring when rocks most frequently roll down the canyon sides. That being the fact, the degree care required in constructing and operating a pipeline of tremendous capacity down the side of Ogden Canyon is much higher, under the doctrine stated in *Makay v. Breeze*, *supra*, because the danger of injury to property and even of the destruction of human life to be anticipated in the latter case is much greater. One may reasonably take chances in a desert that would be unreasonable in a crowded city. Hence it is quite reasonable to require defendants to protect their pipe in Ogden Canyon, even if it be conceded that it would have been unreasonable to make a similar requirement for the Logan Canyon flume a generation ago. For this additional reason the case relied on by defendants is not applicable.

In view of the fact that the defendants here cite 45 C. J. 746 (736?) to the effect that an injury resulting directly and proximately from an act of God is not recoverable, it will perhaps be helpful to the Court to quote from the same authority, at the same page, the text writer's definition of an Act of God:

“The term ‘Act of God’ is used to designate the cause of an injury . . . where such injury is due directly *and exclusively* to natural causes *without human intervention, and could not have been prevented by the exercise of human care or foresight*, and for an injury so caused no one is liable . . . In order that this rule may apply the act of God must be the sole cause of an injury, for if an act of God and the negligence of an individual are concurring causes of an injury, the individual who was guilty of negligence is liable for the injury.”

Even if we were to concede that the rolling rocks which released the flood in this case were acts of God (which we do not) still they would not have caused Mr. and Mrs. Knight any damage had it not been for the defendants’ negligence in conducting a tremendous volume of water along the hillside in an unprotected pipe when they knew from experience of the danger of breakage from rolling rocks. Their negligence necessarily concurred, and they are liable.

Before we end our consideration of the first section of defendants’ brief we want to devote a moment to an analysis of the case of

Howe v. West Seattle L. & I. Co.,
59 Pac. 495 (Washington),

which was distinguished by this court in its opinion in the Canal Company case cited by defendants. It is, we submit, indistinguishable from the case at bar. There defendants had placed a log on a hillside. Here the defendants placed a large quantity of water on a hillside. There the defendants failed adequately to protect the log from being dislodged or released to roll down the

slope. Here the defendants failed adequately to protect their water from being released to flow down the slope. There landslides had in the past come down the hillside. Here rocks had in the past rolled down the hillside—even releasing water on previous occasions. There another landslide dislodged the log, which proceeded down the hill, causing injury. Here another rolling rock released the water, which proceed down the slope, causing injury. There it was held proper to submit the case to the jury. Here also the trial court properly submitted the case to the jury.

Under the facts proved it was properly a question for the jury to determine whether a reasonable prudent man would have forseen and guarded against the danger of water being released by rolling rocks. In the light of the experience in Ogden Canyon, where rocks break exposed pipes frequently, according to the testimony of the City Waterworks Department, and especially as there was evidence that a pipe had been so broken previous *at this point*, the defendants' negligence was properly submitted to the jury.

2. *The lower court did not err in denying defendants motion for a directed verdict or in refusing defendants' requested instruction Number One, which would have instructed the jury to find for the defendants.*

In answering the second section of defendants' brief little need be added to what has already been said about the basic negligence of defendants in conducting large quantities of water upon the hillside of a steep canyon without taking reasonable precautions to see that it stayed within its conduit. The question was for the jury, and its verdict cannot properly be upset. The

defendants' evidence only showed that on the same night a second and larger rock bounded into the pipe at a point some 150 or 200 feet west of the break mentioned in the testimony of plaintiffs' witnesses, causing a second break at a point where the pipe was going over a hill, and where it was lightly covered with soil and to some extent protected by the brow of a cut in which the pipe had been laid to keep the grade over the hill lower. Defendants devote much argument to the proposition that they could not have foreseen this break. Although we disagree, in view of the commonly known tendency of rolling rocks to bounce as they roll, we think this is immaterial.

It seems clear from the evidence that the water which caused the damage in this case was released by the two rocks found by the witness Allred (T. 60-63) which were in a low uncovered, unprotected section of the pipe, and farther up-canyon. This hole was about two by three or four feet in size (T. 61), and because it was in a low spot the water at this point would be under greater pressure and would flow faster. The witness Farrell, who first saw the flood, drove through it and apparently never saw the great boulder which caused the break to which defendants' witnesses devoted their attention, although that boulder came to rest in the middle of the road, and was of such size as to be inescapable. The irresistible conclusion is that the break found by Allred, where the pipe was totally unprotected came first, and caused the damage, and that the boulder so cherished by defendants came sometime after Farrell drove through. This conclusion is bolstered by the evidence of the witness Jespersen, who found water at the extreme upper edge of the flood, and only

30 or 40 feet west of the grocery store, high enough to stall him and come up to the cushions of his car. He apparently saw no rock in the road, although he saw enough water at this point to cause all the damage.

We submit that there was evidence from which the jury would be justified in finding that the damage resulted from the break caused by the smaller rocks described by Allred, and which he found by tracing the flood to its source by the mud and debris left. That being the case it is idle to speculate here or to argue that the preponderance of evidence is the other way. This is a law case, and the facts are for the jury, which has found for the plaintiffs on competent evidence. There is ample evidence to show that the pipe was negligently constructed, operated and maintained at the point of this break. We submit that even the other break presented a jury question in the light of past experience with this slope.

Defendants cite and rely on the case of

Ward v. Salt Lake City

46 Utah 616, 151 Pac. 905,

to the effect that in the construction of public works a city's duty is discharged if it merely employs a competent engineer to draw plans and then follows the plans. That rule is closely related to and apparently influenced by the rule of the immunity of the sovereign. It is akin to the "public policy" theory under which charitable corporations are liable for the torts of their servants only if they are negligent in choosing and employing the servant. 10 Fletcher Cyclopaedia Corporations, §§4923 and 4927. So far as we know the rule has never been extended, and we submit it should not be extended to situations such as this.

For here we do not have a municipal arm of the sovereign, a city government of, by, and for the people. Nor do we have a charitable corporation dispensing quasi-public charity without private profit. Here we have groups of men organized into corporations for private profit—for their own financial gain. To apply the doctrine of the Ward case here would be to let down the bars completely. The defendant Power Company could plead with quite equal logic that it was not responsible for the reckless driving of one of its truck drivers, because, forsooth, he had passed a driving test and submitted a chauffeur's license before he was employed.

Actually the Utah rule that a city is liable for failure to exercise due care in selecting an employee to draft plans for a public improvement is a departure from the general rule that the adoption of plans is a governmental function in the performance of which the city has the sovereign's immunity from tort liability. See

38 Am. Jur. 328 and 336, "Municipal Corporations" § § 628 and 634.

It can have no application to the negligence of private corporations for profit.

Defendants argue, however, that in fact the sovereign United States of America planned and built the pipe in this case and, as the rule would apply to the United States, that defendants can be liable only if the United States would be liable, as (it is claimed) they came into the picture "*only after the project was completed.*" (Italics ours). Perhaps the most obvious thing wrong with this argument is that the facts are not as stated by defendants. The government constructed

the pipeline pursuant to and in accordance with a pre-existing contract with the defendants specifying that the line should be buried only in the same manner as the Power Company's previous line (which had been broken by rocks) and under which the *plans were subject to the approval of the Power Company*. See our statement of facts, page 1, *supra*. Thus defendants' contract, for which they were responsible, required the government to construct the pipe in a way that defendants knew was dangerous. It is true that a government engineer drew the plans which were incorporated in the contract, but this would not relieve the defendant corporations of their duty to use due care in approving the plans. The government certainly would not have proceeded without the approval and cooperation of the defendants and their execution of the contract. The defendants had practical control, and as private corporation sthey are responsible for their negligent exercise thereof.

Moreover, it is apparent that the engineer working on the plans was not left free to plan a safe conduit according to his knowledge and experience, but was compelled to compromise safety factors with financial factors in order to gain the cooperation of defendants in the project. (T. 147-148.) It was decided that, in the interest of economy for defendants, the plaintiffs should be exposed to a risk of a flood let loose by rolling stones which should have been anticipated. Surely under these circumstances defendants should not be permitted to hide behind the skirts of the sovereign! If, to save themselves money, they knowingly exposed plaintiffs to danger of injury, they are responsible for that injury. They took the risk for plaintiffs, and now should take the consequences.

Moreover, defendants' argument overlooks the fact that when the pipe was turned over to them the defect and danger was apparent, and it was negligent of them to fill the pipe with water without first correcting the dangerous defect. Even if it were conceded, for the argument's sake, that they were not responsible for the manner in which the pipe was constructed, still, having knowledge of that danger (which the engineer perhaps did not) they coursed a tremendous stream of water through the pipe without first taking precautions to see that it would not escape through the intervention of natural forces, and it was proper to submit the case to the jury. This is the rule even with respect to sovereign municipalities. "As soon as the fault or injurious consequences are known, or ought to be known to the municipality, *it is duty bound to remedy the defect, if this can be done, or, if not, to cease the operation of the public agency until the defect is remedied*; the penalty of refusal after reasonable notice will be liability in damages for the injuries caused by the defect." (Italics added.)

38 Am. Jur. 329, "Municipal Corporations,"
§ 628, nt. 8.

See also

Morris v. Salt Lake City
35 Utah 474, 101 Pac. 373, syllabus 9.

It was there held that the city was liable for failure to remove trees left standing after their roots were cut by an independent sidewalk contractor, even if the cutting was a necessary incident to a proper plan for the sidewalk, where the city had knowledge of the danger created by the contractor's act and failed to correct it

before the wind (a natural force, as here) blew the trees over. We think this case is exactly in point on the question of defendants' operational negligence. The evidence is that this pipe was broken once before, and still defendants took no steps to remedy the patent defect.

Defendants further argue that plaintiffs assumed the risk of injury by building or buying a home under the pipeline after the pipe was constructed. This is of course tantamount to an assertion that by negligently building their pipe the defendants acquired the right to forbid or prevent the normal and usual use of all land below the pipeline. That of course is not the law. If defendants wanted to take the land for use as a reservoir for flood waters released by their pipe when it should break, they should have condemned it and paid its fair value. The land was there for some hundreds of centuries before the pipe was built, nor did defendants show that it was not in private ownership, with the incidental right to normal use, before any pipe was laid in Ogden Canyon. Defendants could not take away this right either directly or indirectly without compensation.

The doctrine of assumed risk is applicable only where the injured person might reasonably elect whether to expose himself to the danger, and if he could not reasonably escape he assumes no risk.

38 Am. Jur. 848, "Negligence," § 173.

Here the property owner could not pick up his land with the building on it and move it to a safer place. Building plots are not ambulatory. He could only avoid risk of injury by abandoning his property—which would itself be an injury suffered if the abandonment were forced by defendants' negligence. Plaintiffs were not reasonably

free to elect whether or not to expose themselves to the risk, especially in view of the well known housing shortage.

Nor is a property owner bound to forego the improvement of his land because the preexisting negligence of another makes it probable that the land and improvements will be flooded and damaged.

North Bend Lumber Company v. Seattle (Wash.)
199 Pac. 988, 19 A.L.R. 415, 419;

Annotation: 19 A.L.R. 423.

Defendants urge also that they used reasonable care under the circumstances, and the fact that they did not use greater care will not render them liable. The question was submitted to the jury under proper instructions to determine whether defendants exercised the care a reasonably prudent man would have exercised under the circumstances. The jury, by its verdict, has found that defendants did not act with ordinary caution. The evidence described in considerable detail the history of the breakage of exposed water pipes in Ogden Canyon, and the experience of Ogden City before and after it buried its parallel pipe. It was for the jury to say whether defendants used reasonable care under the circumstances.

Defendants also seem to intimate that the rock here was so large that no precaution could have avoided the break—that the rock was, in effect, a *vis major*. But we have already pointed out that there was evidence that the damage in fact came from two very ordinary rocks. The court instructed the jury that defendants were not required to prepare to meet unlooked for and over-

whelming displays of adverse power of such nature as to surprise cautious and reasonable men. (R. 062) Apparently the jury was of the opinion either that the smaller rocks did the damage, or that reasonable men would not have been surprised or overwhelmed by the large one, and that reasonable protection of the pipe would have averted the break. In any event, it was a question for the jury. We have already referred to the principle that negligence concurring with an act of God to produce injury is actionable.

We submit the court did not err in denying defendants' motion for a directed verdict and refusing their requested instruction number one.

3. *The lower court did not err in refusing defendants' requested instructions Nos. 9 and 14.*

(a) Defendants' request No. 9 which would have charged that defendants were not required to anticipate that a rock would be broken from a certain cliff "and therefore plaintiffs would not be entitled to recover" is clearly improper, and was properly refused. Whether an ordinary prudent man would foresee the severance of the rock would in any event be for the jury. Moreover, the question of the breaking of the rock from any particular cliff is utterly irrelevant. The question really involved was whether a reasonably prudent man would have foreseen the danger from rolling or bounding rocks from whatever source on the hillside above. In view of previous experience in evidence it seems clear that such a man would have anticipated that rocks would roll over and into an exposed pipe. Such rocks were common experience. To say that a man is not negligent because he could not in advance place his finger upon the

particular rock destined to break the pipe is obviously wrong. The foreseeability of the terminus, not the source of rolling rocks on this mountainside, was the point in issue. Moreover, the distance to the cliff is immaterial, so long as the slope from the cliff to the pipe is uninterrupted, as it is. Defendants are not entitled to assume that a rock, once started rolling, would just become tired and stop after so many hundred feet. Moving rocks rarely stop on a slope.

(b) Defendants' Requested instruction No. 14 deals with proximate cause. It would have instructed in effect, that if the flood waters released from defendants' pipe would have missed plaintiffs' home "but for" the plowing of the snow from the state highway so as to make a channel of the road, plaintiffs can't recover. In their argument on this point defendants say, "Under *normal* conditions it [the water] would have flowed from the highway and into the river long before it reached plaintiffs' property." (Italics added.) That statement is *entirely* without support in the evidence. On the contrary, all the evidence was that the situation at the time of the accident was entirely normal. The evidence without any conflict was that the winter snows were *always* plowed out of the road in the same manner. This was well known. As defendants' superintendent in charge of the pipeline testified, that was done every year, and was a condition known to everyone; it exists on all canyon roads. (T. 245-246.) That this is normal is further shown by defendants' own photographic exhibits, *taken the following February*, and showing a similar, but even more extreme, channel. In other words, this channel, which defendants would have the court regard as an

intervening cause, was part of the normal topography of the area every year during the season of rolling rocks. Defendants were not entitled to assume that it would be otherwise, or that it would not carry escaping waters down the roadway from a break at this or any other point above the road.

Defendants' argument is thus seen to rest upon a false assumption of fact: namely, that the "normal" condition of the road was freedom from snow which had been plowed into banks. Quite the contrary was true under *all* the evidence, and the argument falls with the false assumption on which it was based. There was nothing in the evidence on which to base the giving of the requested instruction, and it was properly refused.

Moreover, the intervention of independent intervening causes will not break the casual connection if the intervention of such forces was itself probable or foreseeable.

38 Am. Jur. 727, "Negligence"
§70, nt. 4

Here the practice of plowing of the road and its probably result were well known to defendants. The defendant Power Company's pipe had previously broken and the water had flowed down the road for 1,000 feet. (T. 38-39.) And even if the plowed-out road had been an abnormal rather than a normal winter and early spring condition, still the requested instruction would have been improper because it ignores the question as to whether such condition was foreseeable. It states without qualification that if the water was channelled to plaintiffs' property by the plowed road, the verdict must be for defendants. That is not the law, as we have pointed

out. Hence the request, as framed, was properly refused even if there had been (as there was not) evidence on which a proper instruction on this detail of probable cause might have been based.

In effect the annual plowing of the road was not an intervening cause, but a pre-existing topographical condition, of which defendants had knowledge, and which merely set the stage for defendants' negligence, as did the steep, rocky mountainside. But even if the plowing each year should be deemed a new act, unrelated to the pre-existence of the highway and the annual snows, still it was a lawful and proper act for the highway officials to do, and being without fault, it would not be, in law, an efficient intervening proximate cause.

38 Am. Jur. 732, "Negligence," § 73, nt. 4.

Nor can the plowing of the road be *logically* classed as an *efficient* intervening cause. It could not have flooded the Knight home; it produced no water. At most it would be a *concurring* cause. And the rule that where the negligence of two tort feorsors *concur*s to produce an injury they are jointly and severally liable is too well known to require citation of authority. However, see

45 C. J. 920.

See also

Coleman v. Bennett
69 S. W. 734, 735,

a case extraordinarily like the one at bar on this question of proximate cause. There the defendant wrongfully dammed a stream. Subsequently a third party built a levee along the reservoir so formed. During a freshet

the levee washed out, and the debris therefrom, drifting downstream on the released waters, formed obstructions which threw the waters on plaintiff's lands. Without the dam the waters would not have been thrown against the third party's levee. Without the obstructions which came from the levee the water would have flowed harmlessly down the natural channel after leaving the dam. It was held that the dam was a proximate cause of the injury, uninterrupted by the construction of the third party's levee, and the defendant was liable even though no injury would have resulted without the concurring act of the third party.

We submit that the defendants' request No. 14 was properly refused. The quotation from

Rollow v. Ogden City
66 Utah 475, 243 Pac. 791,

in defendants' brief (pp. 39-40) is not applicable, for the reason that there was no evidence of a "new or independent" cause, but only, at most, of a normal condition which was a "concurring" cause, of which defendants had full knowledge in advance.

4. *The lower court did not err in its instructions 1, 5, 9, 10, or 12.*

(a) *As to Instruction No. 1.*

Defendants complain of the court's instruction outlining the issues because it stated plaintiffs' allegation that "defendants carelessly and negligently left the said pipe lying unprotected upon the surface of the ground," contending that there was no evidence to go to the jury on that issue, as (so defendants say) the evidence showed the pipe was protected by the brow of a cut and by six inches of earth.

In the first place, there was evidence that the pipe was uncovered at the point of the easterly break which caused the injury. The witness Allred testified that at the point of the break and for several rods east the pipe was completely bare, and lying on top of the ground. (T. 62-64). *That was not disputed.* And whether the brow of the cut at the point of the subsequent break referred to by defendants, and a mere six inches of dirt, were “protection” was properly for the jury. There was no error in outlining the allegation and the denial, especially where, as here, the trial court’s attention was not timely invited to defendants’ claim by a suitable request for an instruction withdrawing that issue.

Defendants also complain of the sentence in which the court states plaintiffs’ allegation that defendants knew or should have known that every spring frost loosened rocks roll down the mountainside and across the location of the pipe. This seems highly technical, and could not have confused the jury, especially in view of the fact that the paragraph in question was initiated with the words “The plaintiffs in their complaint allege . . .”, the immediately ensuing paragraph begins “Plaintiffs further allege . . .”, and the instruction concludes “You are instructed that the foregoing allegations and denials are not to be considered by you as statements of fact . . .” We should presume that jurors are of ordinary intelligence, and clearly no ordinary intellect cognizant of the ordinary uses of the English language would be misled by the instruction. Moreover, the error, if any, was harmless, for on the trial the servants and agents of the defendants admitted the knowledge alleged.

The instruction might well be upheld as a proper statement of the law, for it is the law that everyone

must take notice at his peril of such ordinary results of the operation of physical laws as the effect of the force of gravity on objects subject thereto, or the effect of a thaw on a frozen mass on a slope.

38 Am. Jur. 712, "Negligence" § 60.

We believe the defendants are bound in law to know this phenomenon of springtime in the Rockies. However it is not necessary to go so far to hold this assignment of error is not well taken.

(b) *As to Instruction No. 5.*

Surely there is no merit to this assignment of error. Defendants complain that the court's general instruction on proximate cause was not qualified by the statement that proximate cause must be operative "*without the intervention of any new or independent cause.*" However the court did instruct that proximate cause is "that cause which, in a natural and continuous sequence, *unbroken by an efficient intervening cause,* produces the injury" (Italics added.) The court gave the substance of what defendants contend for, and there is no particular or peculiar virtue in the exact phraseology employed by defendants or by this court in the Rollow case, *supra*.

Moreover, as we have heretofore pointed out, there was here no evidence on which an instruction on intervening cause could properly be based. It follows that any error which might have been committed in this regard was non-prejudicial.

The court's instruction, may we add by way of post-script, is a stock instruction taken from a definition having the most general approval. See

45 C. J. 898, note 15.

(c) *As to Instruction No. 9.*

This instruction is taken almost verbatim from the very carefully considered and worded statement of this court in one of its leading cases, that of

Lisonbee v. Monroe Irrigation Company
18 Utah 343, 54 Pac. 1009.

We submit that it correctly states the law of this state applicable to the facts of this case.

Defendants complain of the first paragraph as “a purely gratuitous theoretical observation . . . which has no place in instructions of law.” We submit that it states a matter of common knowledge of which the court takes judicial notice, and which furnishes a perfectly proper introductory statement and background to assist the jury in a proper understanding and application of the balance of that and other instructions. There is no error here—and even if there were it could not possibly be prejudicial.

Defendants do not complain that the second paragraph of Instruction No. 9 does not correctly state the law applicable to this case. Their complaint is only that the court, having instructed (No. 7, R. 061) that the jury could not find for the plaintiff unless it found the pipeline was negligently constructed, now instructed further regarding negligent use. It is conceded, however, that defendants were in fact using the pipe to conduct large quantities of water along the mountainside, and (as there was ample evidence) they were doing so after more than adequate knowledge of the dangerous defect and opportunity to correct it. The error, if any, was

committed in giving instruction No. 7, and was prejudicial to plaintiffs, not defendants. As we have heretofore pointed out, defendants, whether or not they were responsible for the negligent planning and construction of the pipe, were in any event under a duty not to use the pipe until they had remedied the defect. The danger, of course, was apparent to all who were not blinded to it by the desire to keep down the cost of construction. They had notice, but consciously discounted it to save a dollar—at the expense of the Knights.

The court properly instructed the jury as to the use of the pipeline.

(d) *As to Instruction No. 10.*

Here again defendants do not complain that the instruction improperly states the law (see *Mackay v. Breeze*, supra) but only that the instruction permits consideration of their negligent use and operation thereof. This, as we have demonstrated in the immediately preceding paragraphs hereof, was perfectly proper under the pleadings and the evidence. In view of the construction of the line, any operation thereof for coursing a large flow of water was negligent. There was no error committed here.

(e) *As to Instruction No. 12.*

As to subparagraphs (c) and (h) of Instruction 12, the plaintiffs prayed for \$375.00 damages by reason of the *destruction* of many items of clothing, and \$50.00 for repairs to clothing which could be salvaged. There was uncontroverted evidence introduced in support of and clearly related to each claim separately. The court's instructions obviously related to these two items, as was

apparent to anyone who had heard the evidence. We submit that there was no error, but that if there was it was prejudicial only to the plaintiffs.

As to subparagraphs (f) and (j) of Instruction 12, they obviously relate to two separate items of damage: The former to the cost of repairs made to the furniture, and the second to the damage "beyond repair," that is, the depreciation still existing after repairs, and which repairs could not obviate. A "repaired" article is never worth as much as it was before it needed repair. It is apparent that in the light of the issues and the evidence, these instructions could not have misled the jury, and no prejudicial error was committed.

While we are confident that the judgment below should and will be affirmed, we are sensible that in every law suit the confidence of counsel on one or the other side in his case must in the end turn out to be without adequate foundation. Because we recognize the (remote, we believe) possibility that there will be a re-trial of this case, we venture to suggest that in such event the guidance of this court on a matter of the admissibility of some tendered evidence would be helpful to the court below, and might avoid the necessity for a second appeal.

At the trial below plaintiffs offered to prove by the witness Allred (the Attorney in fact for Mr. Knight, who was overseas) that in a conversation about this accident with Mr. R. R. Rowell, who was then "Division Manager" of defendant Power Company for the area embracing the territory in question, the Division Manager told the witness, in substance and effect, that Allred should tell Mr. and Mrs. Knight "that the Company

would see that they were taken care of.' (T. 70, 71; 99.) The offer was refused and the evidence excluded on defendant Power Company's objection that there was no showing of authority to bind the company. We submit that from the conferring of the title and duties of a District Manager, and in the absence of rebutting evidence, the authority is implied to make binding admissions of fault and liability for matters within the territory allotted to such a managing agent.

Johnson v. Yost Lumber Company
117 Fed. 2d 53, 59.

This case contains an excellent discussion of the policy and principles involved. And if there is any evidence, then the matter becomes a question for the jury under proper instructions.

See

Goddard v. Lexington Motor Company
63 Utah 161, 223 Pac. 340.

We trust, however, that the court will agree that no substantial error prejudicial to the defendants was committed by the learned judge below, and that it will affirm the judgment. We submit that under the law and the evidence it should do so.

Respectfully submitted,

THATCHER & YOUNG