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Harry Kirk Creamer v. The Ogden Union Railway and Depot Company : Brief of Appellant

Utah Supreme Court

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In the Supreme Court of the State of Utah

HARRY KIRK CREAMER,
Plaintiff and Respondent,

vs.

**THE OGDEN UNION RAILWAY AND
DEPOT COMPANY,** a corporation,
Defendant and Appellant.

Case No.
7664

BRIEF OF APPELLANT

FILED

SEP 25 1951

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BRIEF OF APPELLANT

PRELIMINARY STATEMENT

This action is a suit for personal injuries brought under the Federal Employers' Liability Act, 45 U. S. C. A. 51, et seq. Plaintiff, Harry Kirk Creamer, brought this action against his employer The Ogden Union Railway and Depot Company for permanent damage to his heart allegedly sustained as a result of the negligence of the defendant in

causing the plaintiff's heart to be overtaxed and overexerted. The cause of action allegedly arose on the 11th day of August, 1949, at Ogden, Utah. The case was tried to a jury which returned a verdict in favor of the plaintiff in the sum of \$15,000.00. From this judgment the defendant appeals.

The record on appeal contains all the proceedings in the action as we deemed it necessary to include the whole record for a complete understanding of the case. The record citations used throughout this brief which refer to matters of evidence are taken from the page numbers of the transcript of the evidence contained in the record.

STATEMENT OF FACTS

Harry Kirk Creamer, the plaintiff in this action, was employed by the defendant, The Ogden Union Railway and Depot Company on August 21, 1946 as a coach cleaner (Tr. 13). Between that time and the date of the accident alleged, which was August 11, 1949, he performed the duties of a coach cleaner for his employer. His duties as a coach cleaner consisted of washing railroad cars and servicing trains. The servicing of trains included supplying the same with water and other supplies and also included the duty of icing cars (Tr. 14). This work was performed upon passenger cars and diners and was not connected with the handling of freight cars. At the time of his employment by the defendant the plaintiff was required to undergo a physical examination. This examination, made by Dr. Rulon F. Howe of Ogden, disclosed no physical defects. A

copy of the report made by Dr. Howe is Exhibit "4" contained in the record (Tr. 132). It is particularly to be noted that the report made to the company disclosed no defects in so far as the plaintiff's heart was concerned.

On August 11, 1949 the plaintiff was 36 years of age, was 6 feet 1 inch tall, and weighed 215 pounds (Tr. 66). He had never been sick for twenty years prior to that date (Tr. 12). In addition, the evidence disclosed that he had satisfactorily passed a physical examination at the Ogden Arsenal some time before his employment by the Depot Company (Tr. 13), and that he had performed manual work during most of his life (Tr. 12). The record also discloses that he had been active in hunting and fishing and other forms of athletic recreation (Tr. 68).

On August 11, 1949 he was assigned to the task of icing diners. The methods of performing this work and also the extent of the work which Creamer did will be discussed in detail hereafter. At the end of his shift on this date and during the course of the ensuing night and day Creamer suffered a heart failure, which resulted in a permanent worsening of his heart condition for which damages are sought in this action.

The medical evidence from plaintiff's doctor who testified as a witness, and also from the doctors who testified for the defendant establishes beyond any question that Creamer was suffering from rheumatic heart disease prior to his employment by the defendant (Tr. 36). (The testimony of the defendant's doctors corroborates our statement.) This condition is caused by disease, which produces

inflammation of the heart and the muscles of the heart, resulting in scarring of the valves, and not by injury (Tr. 23). This scar tissue produced by disease is often a subtle thing with no symptoms at all (Tr. 26). It is not unusual that physical examination by a competent doctor will fail to reveal such a condition (Tr. 36). Such a condition does not always manifest itself during the life of the individual, but usually does so sooner or later, and the years between the ages of 35 and 45 are typically the period when failure of the heart occurs (Tr. 26). Usually failure of the heart, as distinguished from the rheumatic heart disease, is actually precipitated by exertion which the doctors classified as unusual and severe (Tr. 29). (This is confirmed by the testimony of Dr. Don D. Olsen for the defendant.) But the words "unusual and severe" exertion as used by the doctors refer to a type of exertion which is unusual and severe for a person with a damaged heart and do not mean that the exertion would be injurious to a person with a normal heart (Tr. 39). Any type of relatively strenuous effort may cause such failure of a rheumatic heart, whereas, the heart of a normal person will not be damaged by the same activity (Tr. 40). Both of the doctors who testified concerning Creamer's condition at the trial stated that he had suffered a permanent diminution of his working capacity in that the failure of the heart had permanently impaired its previously weakened and rheumatic condition. Dr. Don D. Olsen testified that the work which Creamer did on the day of the accident had probably contributed to the failure of his heart, but that this work, while strenuous, was not dangerous to a person with a normal heart. We respectfully

submit that a summarization of the medical testimony concerning the nature of Creamer's so-called "injury", is as follows:

1. The plaintiff was afflicted with rheumatic heart disease before he was employed by the defendant.

2. This fact was unknown to Creamer and to the defendant until after the heart went into failure in August, 1949, despite the fact that the plaintiff had been physically examined before that time.

3. It is neither unusual nor indicative of any blameworthiness that such rheumatic heart condition was not discovered on medical examination.

4. Strenuous work performed by Creamer for the defendant probably precipitated the actual heart failure, but did not cause the rheumatic heart condition.

5. This strenuous work was characterized by Dr. J. G. Olson as severe and unusual and by Dr. Don D. Olsen as difficult exertion, but it is clear from the testimony of both of these doctors that what was meant by the language used was exertion which was excessive for a diseased heart, although not excessive for a normal, healthy heart.

6. The actual work performed by the plaintiff on the day of the so-called accident was neither dangerous nor harmful to a normal person. Concerning this matter Dr. Don D. Olsen's testimony, which is absolutely uncontradicted in the record, is as follows:

"Q. Doctor, are you familiar with the work in icing diners down here in the yards of the O. U. R. & D. Railway Company?

"A. Quite familiar. I understand they carry ice up and put in the cars.

"Q. In climbing ladders with a cake of ice weighing one hundred pounds?

"A. Yes.

"Q. Doctor, assuming a normal person, with no heart disease, and who is otherwise in good health, assume he is called upon to work during the course of approximately three hours to carry chunks of ice of one hundred pounds up a ladder of about fourteen feet high, I think the testimony is, and upon the top to break into smaller pieces and put down in the holes there in top of the diners. Assume the man who does that, he is about thirty-five or thirty-six years of age. He is in the neighborhood of 6'4" tall and he weighs approximately 205 pounds, I think the testimony is, and normally muscular; would that kind of exercise damage or in any way injure the heart of such a person?

"A. I wouldn't think so.

"Q. Is that overexertion for the heart of a normal individual?

"A. No." (Tr. 126, 127.)

The facts pertaining to the alleged overexertion which precipitated Creamer's heart failure are simple. At approximately 11:30 A. M. on the 11th of August, 1949, the plaintiff was assigned by his foreman to ice three dining cars. This work required that he fill bunkers on top of the diners with small chunks of ice. Alongside the various tracks where these diners had been placed other employees had spotted small hand trucks loaded with large cakes of ice, weighing approximately 300 pounds each. A photograph of one of these hand trucks is contained in the file as Exhibit "2". It was Creamer's duty to cut these large pieces of ice into smaller pieces, which he could carry on

his shoulder to the top of a diner, where he would chip the ice into small fragments, filling the bunkers (Tr. 18, 74, 75). Creamer knew that the existing instructions from his supervisors were that each man was to choose the size of the piece of ice which he carried to the top of a diner. The instructions further provided that no one was to attempt to carry a larger piece of ice than the man himself felt that he was able to handle (Tr. 42, 71, 72). Pursuant to these orders and in accordance with the custom adopted by various men who performed the same work for the Depot Company, Creamer made between 26 and 30 trips up a ladder approximately 14 or 15 feet high carrying chunks of ice weighing approximately 100 pounds each during the remainder of his shift on that day. In addition to this work of carrying ice up the ladder, he also chipped these 100-pound pieces of ice into small chunks to feed them into bunkers at the top of the diners. There were actually three and one-half hours remaining on Creamer's shift when this work was commenced (Tr. 74, 76). Creamer knew that this was plenty of time for the job (Tr. 76), and he likewise knew that if he finished the task before 3:00 P. M., when his shift ended, he would be permitted to quit work and spend the time getting himself cleaned up and ready to go home, although he was being paid until 3:00 P. M. (Tr. 76). That he was not rushed in doing this work is evidenced further by his testimony that at approximately 1:30 P. M. he rested for a period of approximately one-half hour while smoking and talking with a friend, who was a fellow employe off duty (Tr. 50, 51). The fact as to this rest period was corroborated by his own witness, Louis D.

Waymen (Tr. 84). At the time when Creamer finished the job between 2:00 P. M. and 2:30 P. M. there was at least half an hour remaining in his shift (Tr. 75). At the conclusion of the job he became short of breath, was dizzy, and experienced the symptoms which are attached to a failure of the heart. It is perhaps significant that Dr. J. G. Olson, plaintiff's witness, thought plaintiff's heart had begun to fail about ten days before this date (Tr. 35).

Briefly summarized, the facts concerning the activities in which Creamer engaged which precipitated the injury to his heart, are as follows:

1. In a period of approximately three hours he carried between 26 and 30 separate pieces of ice, weighing approximately 100 pounds each, up a ladder 14 or 15 feet high, to the tops of three different diners.

2. He performed the work under express instructions that he should carry no larger chunks of ice than he felt himself capable of handling.

3. At the top of these cars he chipped the ice into smaller pieces, about the size of a man's fist, and thereafter placed the same in bunkers.

4. He set his own pace in doing the work, having plenty of time within which to do the job, and sufficient time to rest for at least one-half hour, and also to finish the job at least one-half hour before the end of his work shift.

Several witnesses for the plaintiff testified that the process of icing diners was hard work, involving strenuous demands upon the strength of workmen. Other witnesses for the plaintiff testified that there were mechanical devices such as fork lifts and other types of machinery which were capable of lifting ice to the top of a diner. Since we admitted at the trial and are now willing to concede that machinery exists which is capable of lifting ice to the top of a diner, we see no point in detailing the testimony in this regard. We likewise concede and the evidence shows that the work of icing diners is hard work. The evidence further disclosed that this manual method of icing diners had been used for many years; that more than 100 different individuals had performed that work during the six years prior to the accident, and that women had done this work during the war years, although the women who had done the work had not been permitted to choose the size of the piece of ice which they were to carry to the top of a car. Instead, they had been required to carry a piece no larger than 30 pounds because the foreman understood that the state laws so required (Tr. 116, 117).

The only express medical testimony concerning the effect which this work as performed by Creamer would have on a normal heart is to be found in the testimony of Dr. Don D. Olsen hereinabove set forth verbatim, wherein he stated that the work was not dangerous to a person with a normal heart. Therefore, we assert that evidence is completely lacking that the defendant required of its workmen the exercise of effort which was dangerous if the workmen were in a normal condition.

POINTS UPON WHICH APPELLANT RELIES FOR A REVERSAL OF THE JUDGMENT.

POINT I.

AS A MATTER OF LAW PLAINTIFF WHOLLY FAILED TO ESTABLISH THAT ANY NEGLIGENCE OF THE DEFENDANT CONTRIBUTED TO PLAINTIFF'S INJURY.

POINT II.

INSTRUCTION NO. 15 GIVEN BY THE TRIAL COURT AT THE REQUEST OF THE PLAINTIFF ON THE SUBJECT OF DAMAGES CONSTITUTES REVERSIBLE ERROR FOR THE REASON THAT SAID INSTRUCTION IS ARGUMENTATIVE.

ARGUMENT

POINT I.

AS A MATTER OF LAW PLAINTIFF WHOLLY FAILED TO ESTABLISH THAT ANY NEGLIGENCE OF THE DEFENDANT CONTRIBUTED TO PLAINTIFF'S INJURY.

(a) *The negligence which plaintiff charged against the defendant:*

By his complaint plaintiff alleged that liability of the defendant existed on the following grounds:

1. Negligence in requiring the plaintiff to pull heavily loaded ice wagons manually to and from

various positions along the platforms in the Ogden Yard without mechanical assistance.

2. Negligence in requiring the plaintiff to carry 100-pound cakes of ice on his shoulder up a ladder to the tops of diners, subjecting the plaintiff to unusual hazards and dangers of overexertion and overwork.

3. Negligence in failing and neglecting to furnish the plaintiff with a tractor or other mechanical device with which to pull ice wagons along the platforms above referred to.

4. Negligence in failing to furnish the plaintiff with a mobile elevator to lift the ice blocks to the tops of the diners.

5. Negligence in failing to furnish the plaintiff with a conveyor belt to lift said ice blocks to the tops of diners. (R. 3, 4.)

Stripped of the verbiage employed by plaintiff's counsel, plaintiff's complaint charges the defendant with negligence in requiring the plaintiff to overexert himself in two different ways when machinery could have performed the task. The first alleged overexertion is the handling of wagons loaded with ice along the platform, and the second is the carrying of ice manually to the tops of diners. Plaintiff's whole contention is that the defendant was guilty of negligence in requiring the plaintiff to perform these two tasks manually, rather than with the aid of machinery.

(b) The facts as to these charges of negligence:

The evidence concerning the work of moving ice wagons along the platform does not have any significance whatever in determining the question of the defendant's

negligence. The plaintiff did not even suggest that he had overexerted himself in handling ice wagons on the day of the accident. Concerning the task of icing the first two diners on which he worked on August 11, 1949, the only mention which plaintiff made of moving ice wagons is to be found at page 49 of the Transcript, where he stated that he moved three or four small wagons partially loaded with two or three cakes of ice about 20 or 30 feet to ice the first diner. In icing the third diner on that date plaintiff testified that he moved another ice wagon approximately 100 yards with the assistance of two other men (Tr. 51). There is no testimony that this work constituted an undue burden upon the plaintiff's heart, nor is there any testimony that this work had any effect in precipitating the failure of the plaintiff's heart. In the hypothetical question which plaintiff's counsel asked of Dr. J. G. Olson concerning the cause of the failure of the plaintiff's heart no mention was made of any work in connection with moving ice wagons. Dr. J. G. Olson attributed the failure of plaintiff's heart entirely to the work which Creamer did in carrying 100 pound cakes of ice up a ladder to the tops of the three diners (Tr. 28, 29). In the absence of any evidence from the plaintiff or from his doctor or any other witness that moving the ice wagons resulted in overexertion or resulted in any failure of the plaintiff's heart, we respectfully submit that the only remaining theory of negligence on which the plaintiff can possibly recover is the alleged negligence of the defendant in requiring the plaintiff to carry 100-pound cakes of ice to the tops of these diners without machinery to do the work for him.

The facts pertaining to the work which Creamer was asked to perform in carrying ice to the tops of the diners have been heretofore set forth in some detail in this brief. It remains for us and for this court to analyze these facts to determine whether or not an issue was presented for submission to a jury as to the defendant's negligence.

(c) *As a matter of law the evidence in this case is not sufficient to establish the negligence charged:*

The negligence charged in connection with moving of ice wagons being completely unsubstantiated as heretofore pointed out, we confine our discussion to the possibility that the defendant was negligent in requiring the plaintiff to carry ice up a ladder to the top of the dining cars on the date of the so-called accident. Intelligent determination of the problem requires only the application of fundamental basic legal principles to the facts involved. As said by Mr. Justice Latimer, speaking for this court, in the case of *Lasagna v. McCarthy, et al.*, 111 Utah 269, 177 P. 2d 734:

“Negligence of the employer being the basis for recovery under the Federal Employers' Liability Act, it is well to return to the ordinary definition of the term, which is ‘the omission to do something which a reasonable person, guided by those considerations which ordinarily regulate the conduct of human affairs would do: or the doing of something which a prudent person under like circumstances would not do.’ ”

Application of this well settled definition of the concept of negligence to the facts of the case at bar makes it obvious that the plaintiff failed to produce any evidence which

would justify reasonable persons in arriving at the conclusion that the defendant was negligent. The Depot Company neither asked nor required of the plaintiff that he do work which was dangerous to the health of a normal human being and exposed the plaintiff to no danger which either he or the defendant knew, or should have known, to exist. The conclusion is therefore inescapable that the defendant neither omitted an act which a reasonable person would have done, nor committed an act which a prudent person would not have done. Because there is machinery in existence capable of eliminating the manual effort required to lift ice to the top of a diner, it does not follow that it is negligence to require that the task be performed by manual labor instead of by use of the machinery.

Proof that there are two methods of accomplishing the same task does not establish that either method is negligent. That the first method may be quicker, easier or even safer than the second does not prove or establish that the second method exposes someone to an unreasonable risk and is therefore negligent. As was said by Mr. Justice Latimer in his concurring opinion in the case of *John D. Marshall v. The Ogden Union Railway and Depot Company*, in ... Utah ..., 221 P. 2d 868:

“The test to determine plaintiff’s conduct is not whether there were safer places which could have been selected by him, but rather, whether or not under the facts and circumstances known to him he acted as a reasonably prudent person.”

The question in this case is not whether there exists another method of doing the work which Creamer did. The ques-

tion is whether or not the method designated for Creamer's use deviated from the standard of reasonable conduct.

Although the icing of diners admittedly requires considerable effort on the part of the men who perform the task, there was no justification for the contention that Creamer was required to abuse himself on the day of the accident in performing the assignment he had received. The work did not require that he make 26 or 30 trips up and down the ladder without rest and at high speed. Under the evidence the technique employed by Creamer in icing these diners was to carry several 100-pound pieces of ice to the top of a car where he would there chip the 100-pound pieces into smaller chunks, with a repetition of this process until a diner was iced. With a maximum of 30 trips up a ladder on three different cars, it is obvious that Creamer not only had the opportunity, but was compelled to space the actual climbing over a substantial period of time on the day of the accident. And the facts should not therefore be considered as though Creamer made or was asked to make 30 consecutive trips without pause or respite. The effect upon a human being of any activity involving effort is always directly related to the speed at which the activity is performed. To walk 100 yards on level ground in five minutes is one thing; to run a 100-yard dash in ten seconds is another. Creamer admittedly finished the job at least one-half hour before the end of his shift, in addition to resting for one-half hour during the course of the job. It cannot therefore be disputed that the speed at which he did the job was completely of his own choice.

In the absence of any knowledge that Creamer was suffering from a heart condition which made it foreseeable that he would suffer an impairment of his health in performing the job to which he was assigned by handling ice of a size he chose and at his own speed, we respectfully submit that no jury could fairly say that the Depot Company chose a method of performing the work which a reasonable prudent man would have considered as dangerous, unsafe or improper. Not only is this fundamental proposition unassailable upon a logical examination of the facts, but it is also abundantly supported by authoritative texts and decisions.

In a rather complete annotation entitled "Liability of Employer for Injury to Employee due to his Physical Unfitness for the Work to Which he was Assigned", 175 A. L. R. 982, the annotator summarizes the law as follows, at page 985:

"An employer is liable to an employee for injuries received in the course of employment, in the absence of statute declaring otherwise, only upon the ground of negligence on the employer's part. The employer is not an insurer of the safety of his employees, unless made so by statute, and is not liable for consequences of the dangers of the employment; in order to charge him with liability for injury to an employee due to the employee's physical unfitness for the work to which he was assigned it is necessary to show negligence on the employer's part in assigning the employee to the work in question or in requiring him to continue at work for which he was not specifically fitted; *this means that in any event the employer must know or be charged with knowledge of the employee's unfitness.*"

In Volume 65 of *Corpus Juris Secundum*, at page 401, in dealing with this subject is the following statement:

“In the absence of anything which should reasonably suggest such a condition, one is not required to anticipate that another may, for some reason, be unable to exercise ordinary care for his own safety, but the duty to exercise special care with respect to a person, who is for any reason unable to take such care of himself as the normal person might, arises only where there is actual or imputed knowledge of the incapacity. Accordingly, negligence cannot be predicated on conduct which would have reached the standard of ordinary care with respect to an ordinary and normal person in the absence of any actual or imputed knowledge of any infirmity or incapacity of the person in question.”

American Jurisprudence states the rule in the following language:

“As hereinbefore stated, the duty to use care is based upon knowledge of danger. It is also true that the care which must be exercised in any particular situation is in proportion to the actor's knowledge, actual or imputed, of the danger to another in the act to be performed. The degree of care necessary to constitute the ordinary care required of a person upon any particular occasion is measured by reference to the circumstances of danger and risk known to such person at the time. Conduct which will be considered extremely careful under one condition of knowledge, and one state of circumstances, may be grossly negligent with different knowledge and in changed circumstances. The consequence likely to be the result of an act or omission is a fact to be taken into consideration in determining the kind and amount of caution to be exercised. The de-

gree of care required to be used in any given case to avoid the imputation of negligence must be according to the circumstances or in proportion to the danger reasonably to be anticipated—such care as is ordinarily sufficient under similar circumstances to avoid danger and secure safety. Where a danger actually is foreseen, the duty is imposed to adopt every possible precaution to avoid an injury therefrom. It will be observed that ordinary care requires only that means be taken to avoid such dangers as are known or reasonably to be apprehended. In other words, ordinary care has reference to probabilities of danger rather than possibilities of peril. Moreover, the rule of reasonable care must be considered not in the light of the accident which happened but with reference to that which ordinary prudence should have anticipated as likely to happen. The mere fact that an accident was avoidable does not prove that there was fault in not anticipating and providing against it.” 38 Am. Jur. 678.

It is well settled that the common law rule of ordinary prudence maintains under the Federal Employer's Liability Act. *Atlantic Coast Line R. Co. v. Craven*, 185 F. 2d 176. In that case the Fourth Circuit Court of Appeals made the following observation:

“The great majority of railroad accidents (including those not involving negligence) could by some means be prevented. The test is whether reasonable men, examining the circumstances and the likelihood of injury, would have taken those steps necessary to remove the danger. (Citing cases.) Under the Federal Employers' Liability Act, the common law rule of ordinary prudence maintains, and a railroad is not necessarily required to employ the latest or the safest devices. (Citing cases.)

* * * * *

"The chances of injury to plaintiff, however, were no greater than those inherent in his type of employment. At no other place in the yard was it negligent for the railroad to obstruct plaintiff's way with moving cars, or to fail to provide a bridge over the tracks. It cannot be said that a different standard of maintenance was required to protect plaintiff at that point where he entered upon or left his duties. The danger was no greater at this point and plaintiff, as a brakeman, knew how to avoid whatever danger that existed. It would have been unreasonable to expect the railroad to take those extreme measures necessary to remove this slight danger."

A problem identical in principle to that in the case at bar was recently decided by the New York courts in the case of *Owen v. Rochester-Penfield Bus Co., Inc.*, 103 N. Y. S. 2d 137. In that case the plaintiff suffered from a chronic valvular heart lesion, with resultant low blood pressure and defective blood circulation. Her feet were frostbitten while traveling on defendant's bus, because the defendant permitted the temperature inside the bus to reach a point which her system was unable to withstand, but which would have done no damage to a normal person. In determining that the plaintiff had not made a case which should be submitted to a jury, although there was some evidence that the bus was equipped with a defective heater, the New York court said:

"Plaintiff's injuries did not come within the realm of reasonable foreseeability. Defendant was under no legal duty to guard against dangers which could not reasonably be foreseen. Negligence is to

be gauged by the ability of one to anticipate danger. The test of actionable negligence is not what could have been done to have prevented a particular accident, but what a reasonably prudent and careful person would have done under the circumstances in the discharge of his duty to the injured party. Failure to guard against a remote possibility of accident, or one which could not, in the exercise of ordinary care, be foreseen, does not constitute negligence. As phrased by Chief Justice Cardozo in *Palsgraf v. Long Island R. R. Co.*, 248 N. Y. 339, 162 N. E. 99, 59 A. L. R. 1253: 'The risk reasonably to be perceived defines the duty to be obeyed.' That no injury was sustained by other passengers demonstrates that there was no danger which could reasonably be apprehended. Had defendant been advised of plaintiff's condition it might well have afforded her some form of additional protection. * * * To hold a carrier liable for injuries or illness to all persons, normal and abnormal, especially when the abnormality is not known, would make a carrier an insurer of the well-being of all passengers. As yet the point has not been reached where such is the law.

* * * * *

"The cases cited by respondent are readily distinguishable. They all deal with foreseeable danger to normal persons and acts which would constitute negligence to normal persons, and stand only for the proposition that a party once guilty of negligence cannot escape additional consequences or damages because of a previously existing condition. Here plaintiff would not have been injured at all but for her previous physical condition."

The opinion aptly expresses the basic distinction between those cases in which liability is imposed for aggravation of a pre-existing condition and cases in which lia-

bility is denied where such a pre-existing condition, unknown to defendant, is itself the source of danger. To impose liability for conduct which results in aggravating a pre-existing physical condition where such conduct would have been negligent as to a plaintiff if he were in normal condition, is a very different thing than to impose liability in a case where the unknown physical defect of the plaintiff is the only factor which makes the conduct of the defendant dangerous at all. We think this distinction is particularly significant in the case at bar for the reason that, as stated by the New York court, "Here, the plaintiff would not have been injured at all but for his previous physical condition."

In the case of *Louisville & N. R. Co. v. Willhite*, 187 S. W. 2d 1010, decided by the Court of Appeals of Kentucky in 1945, the identical problem presented in this case was also decided. There the plaintiff had sued to recover for injuries sustained while in the employ of the defendant railroad as a result of alleged negligence in requiring him to lift cross-ties without providing a sufficient and adequate number of fellow workmen. It appeared from the evidence that the plaintiff had an enlargement of the inguinal rings and spermatic cord, which rendered him peculiarly susceptible to a rupture or hernia at any time. This condition was not known to the defendant employer. In lifting ties the plaintiff sustained a hernia. The Kentucky court made the following statement concerning the law applicable to the alleged negligence of the defendant:

"Appellant was not advised of plaintiff's condition, and had the right to assume (plaintiff) to be

in ordinary physical condition. That being true, (defendant) cannot be charged with negligence unless it is shown by the evidence that it failed to provide a sufficient number of workmen to assist a person of ordinary physique to perform in safety the work required."

In the case of *Bowing v. Delaware Rayon Company*, 192 A. 598, the Delaware courts stated the law as follows:

"In this connection this is to be said: The defendant is not charged with the knowledge that the plaintiff, at any time during her employment, was ill, or in a weakened condition, or otherwise peculiarly sensitive to the gas, and therefore, owed her a duty not to expose her to it in any degree. From all the facts and circumstances, as alleged in the declaration, and as shown by the evidence, the defendant owed to the plaintiff that duty which, in the circumstances, it owed to the average worker in the reeling room, and it is not to be held responsible for injuries resulting from the presence of the gas in the room in a degree not harmful to the average person. For, generally, it is not the duty of a master to establish and maintain conditions which must be safe for every employee. The conditions must be reasonably safe for the average employee. If, therefore, you shall be satisfied that the plaintiff, if she suffered damage as a result of exposure to carbon disulphide in the reeling room, suffered it because of some peculiar sensitivity on her part to the gas, and if the concentration of the gas, if there was gas there, was not such as would have caused injury to the average person, then the plaintiff cannot recover, for, in such circumstances, the defendant would not have been negligent as charged in the declaration."

Other courts have followed these well settled principles.

See

Great Atlantic & Pacific Tea Co. v. Evans,
(Texas) 175 S. W. 2d 249;

Sowers v. Virginian Railway Company, (W.
Va.) 133 S. E. 325;

Hunt v. New York Central Railroad Co., (New
York) 103 N. Y. S. 2d 355;

Southern Railway Co. v. Bell, Sheriff, 114 F.
2d 342;

Warden-Pullen Coal Co. v. Wallace, (Okla.) 56
P. 2d 802.

The defendant made motions for a nonsuit, for a directed verdict, and for judgment notwithstanding the verdict, assigning as the reason therefor the failure of the plaintiff to produce evidence that the defendant was guilty of negligence contributing to the plaintiff's injury (Tr. 107, 143; R. 53). These motions were denied by the trial court. We respectfully submit that the motions should have been granted and that the trial court should have entered judgment for the defendant because of the complete absence of any evidence of negligence on the part of the defendant. No jury should be permitted to find that an employer is negligent because he assigns an apparently healthy young man to do a few hours of hard work. The term "reasonable care" would then have a new meaning entirely unrelated to the actualities of human activity. If the assignment of an employee to do a job at his own rate of speed, handling objects of a size of his own choice, is negligence, then the standards under which this country was built and exists have vanished.

POINT II.

INSTRUCTION NO. 15 GIVEN BY THE TRIAL COURT AT THE REQUEST OF THE PLAINTIFF ON THE SUBJECT OF DAMAGES CONSTITUTES REVERSIBLE ERROR FOR THE REASON THAT SAID INSTRUCTION IS ARGUMENTATIVE.

We believe that this court should order that judgment be entered for the defendant for the reasons herein set forth. But we also seek the views of this court on one other matter presented by the trial of this case. Instruction No. 15 was given to the jury by the trial court at the request of the plaintiff. This instruction was plaintiff's requested Instruction No. 7 verbatim. For the court's convenience we set forth its wording in full:

"You are instructed that if you find the issues in favor of the plaintiff and against the defendant, it will then become your duty to award to plaintiff such damages as you may find from a preponderance of the evidence will fairly and justly compensate him for any injury and damage he has sustained as a proximate result of defendant's negligence complained of by him.

"In determining the amount of such damages, you are instructed that plaintiff is entitled to compensation for all pain and suffering, if any, both mental and physical, which he has endured since the time he sustained his injuries and that he will probably endure in the future; in determining compensation for pain and suffering, if any, you make take into consideration its probable duration and its severity. The law furnishes no way by which to measure what is reasonable compensation for mental and

physical pain and suffering, but it is left to the sound judgment and discretion of the jury trying the case to determine from a preponderance of the evidence what is reasonable compensation to compensate the plaintiff for any physical or mental pain and suffering he has endured or will probably endure in the future.

"You are further instructed that you may take into consideration loss of bodily function, if any, which plaintiff has suffered or which plaintiff will probably suffer in the future.

"In determining the amount of damages referred to in the first paragraph of this instruction, you are further instructed that plaintiff is entitled to compensation for his actual loss of past earnings, if any, and for any impairment of earning capacity, if any, which will diminish his capacity to earn money in the future, and in considering this latter you may take into consideration the degree and character of the loss or impairment of earning capacity, if any, resulting from his injuries and the length of time it will continue, and award to him such damages as will fairly and justly compensate him for the loss of future earnings, if any, which he will probably suffer in the future.

"You may take into consideration whether the injury is temporary in its nature or is permanent in its character.

"The total amount of damages thus assessed for all of the above matters must not exceed the sum of \$30,000.00, the amount prayed for in plaintiff's complaint.

"You are further instructed that the burden rests upon the plaintiff to prove by a preponderance of the evidence the elements of damage, if any, to which he may be entitled." (R. 16, 17, 42, 43.)

In the recent case of *Brown v. Union Pacific Railroad Company*, Case No. 7520 in the files of this court, not yet reported, we challenged an instruction almost identical to Instruction No. 15 as argumentative. It was not necessary for this court to pass upon our contention in reversing the judgment in that case. We now therefore renew our charge that this instruction is argumentative in form and request the court to so hold. We respectfully submit that the overall tenor of the instruction is clearly argumentative. In addition, the repeated use of the words "compensate" and "compensation" throughout the instruction inevitably induces in the jury the impression that liability under the Federal Employer's Liability Act is in the nature of workmen's compensation and is, therefore, independent of a determination of negligence on the part of the defendant company.

The vices of this instruction are observable upon examination of the written word; but they manifest themselves many-fold when the same is read aloud to a jury. Over a period of years counsel for the plaintiff have "worked over" this particular instruction for use in F. E. L. A. cases. The requested instruction is constantly in the process of being amended and expanded for the definite purpose of more fully arguing each case in behalf of the plaintiff. Examination of the instruction shows that the first paragraph thereof advises the jury, in substance, that if the issues are found in favor of the plaintiff and against the defendant, then it becomes the duty of the jury to award the plaintiff damages for such damage as has been sustained as a result of the defendant's negligence. Thereafter,

throughout the course of the page and one-half of the instruction, are delineated various items which the jury may take into consideration in fixing the amount of such damages. Nowhere in the remainder of the instruction is the jury made aware that any recovery is limited to such damages as were occasioned by the negligence of the defendant. If the jurors were attorneys studying such instruction it is likely that they would derive a meaning therefrom which was not erroneous. But such is not the fact. The reading of such an instruction aloud to a jury consumes some substantial time so that to a listener the latter part of the instruction often seems to be divorced from the first paragraph. It seems to us that the wording of the instruction has been chosen for that very purpose. It is our thought as we hear this instruction read in nearly every case which we try against plaintiff's counsel that there is a distinct likelihood that a juror who hears the latter portion of the instruction and who is a layman, untrained in court procedure, will in many instances receive the impression that the plaintiff is entitled to some damages in any event and without regard to the matter of the defendant's negligence.

This court has held that argumentative instructions need not and should not be given at the request of either party. Illustrative of the principle are the cases of *Smith v. Gilbert*, 49 Utah 510, 164 P. 1026, and *Moore v. Utah-Idaho Central Railroad Co.*, 52 Utah 373, 174 P. 873. Instruction No. 15 not only argues the matter of damages for the plaintiff, but is also prone to be construed to argue for the plaintiff that damages should be awarded despite the fact that the defendant was not guilty of negligence.

In addition to this feature of the instruction, it is to be noted that the word "compensate" or the word "compensation" is used throughout the instruction no less than eight times. We respectfully submit that this repeated use of a form of the word "compensation" throughout the instruction is a deliberate and intentional effort on the part of plaintiff's counsel, acquiesced in by the trial court, to convey to the jury the impression that liability in an F. E. L. A. case is identical to liability under the workmen's compensation statutes. Counsel for the plaintiff argue to every jury that the F. E. L. A. is an act provided by Congress in lieu of workmen's compensation. This instruction is cunningly designed to plant in the minds of the jurors the thought that the defendant's liability is as absolute as it would be under workmen's compensation laws. No other explanation for the repeated use of this word seems reasonable. Counsel well know that they would not be permitted over objection to make an oral argument clearly calculated to mislead the jury into the belief that liability under the F. E. L. A. is identical to liability under workmen's compensation statutes. They habitually skirt as near to an outright statement to that effect as they dare. The very narrow gap between what counsel say in oral argument and a direct statement by them to the effect that the defendant is liable independent of fault is completely and effectively filled by the erroneous impression created by Instruction No. 15. Not only is the instruction therefore subject to the criticism that it argues plaintiff's case for him, but also it is subject to the objection that it argues an erroneous legal principle. The Supreme Court of

the United States has rejected the doctrine that the F. E. L. A. is a workmen's compensation act. See *Myers v. Reading Co.*, 331 U. S. 477, 67 S. Ct. 1334, 91 L. Ed. 1615. There the Supreme Court said:

"The respondent is not subject, as has been suggested, to an absolute liability to its employees comparable to that established by a workmen's compensation law. See *Griswold v. Gardner*, 155 F. 2d 333."

The tenor of a court's instructions to a jury should never be such as to argue the case for either side. Care should always be used to see that the instructions given are not in their form argumentative, even though they may technically be correct. Any lawyer with experience in trial of cases by juries made up of laymen knows that the members of the jury are often confused and uncertain at best so that there can be no justification for deliberate attempts to influence them improperly by argumentative instructions. A fortiori the argumentative instructions should not be calculated to induce erroneous impressions in the minds of such jurors.

We respectfully submit that a set of instructions generalized in other parts as were the instructions in the case at bar, containing a detailed discussion of the many items of damages outlined in Instruction No. 15, constitutes a distinct emphasis on the subject of damages rather than on the matter of liability, which can only have the effect of arguing for plaintiff that he should have some verdict. The unfairness of this instruction is further magnified by the implication emanating therefrom that liability of the defendant is independent of negligence and is identical to that of the workmen's compensation.

We realize that this court has rarely been disposed to reverse a judgment solely upon the basis of argumentative instructions. But this instruction was framed in a manner likely to result in a misunderstanding by the jury of the nature of the defendant's liability. It will be used and re-used at the request of plaintiff's counsel until this court condemns it.

We wish to mention to the court that the defendant attempted to assist the trial court in avoiding this error. The defendant requested the court to instruct the jury along the customary lines in connection with damages. Defendant's Requested Instruction No. 9 (R. 27) is the ordinary damage instruction usually given in personal injury cases in this State.

CONCLUSION

For the reasons set forth in this brief, we believe that the judgment of the trial court should be reversed and remanded with instructions to enter judgment of "no cause of action" for the defendant. We also request that this court condemn as argumentative damage instruction No. 15, so as to eliminate the constantly recurring problem presented when plaintiff's counsel request such an instruction.

Respectfully submitted,

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