

1952

Harry Kirk Creamer v. The Ogden Union Railway and Depot Company : Appellant's Reply Brief

Utah Supreme Court

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Recommended Citation

Reply Brief, *Creamer v. Ogden Union Railway and Depot Co.*, No. 7664 (Utah Supreme Court, 1952).
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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 corpor-
 ation,**
Defendant and Appellant.

Case No.
 7664

APPELLANT'S REPLY BRIEF

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Respondent's brief presents certain arguments which are so basically erroneous that they should not pass unchallenged:

(1) Respondent, hereinafter referred to as the plaintiff, argues by his brief that the defendant was negligent as to a class of which the plaintiff was a member, and consequently, was negligent as to the plaintiff (Respondent's Brief 22, et seq.).

(2) The plaintiff argues that *this* case should have been submitted to a jury because jury trial is "a basic and fundamental feature of our system of federal jurisprudence and is part and parcel of the remedy afforded railroad workers under the Federal Employers' Liability Act" (Respondent's Brief 41, et seq.).

(3) The plaintiff argues that Instruction No. 15, if erroneous, does not constitute prejudicial error because the defendant makes no claim that the damages awarded were excessive (Respondent's Brief 47, 49).

Answering these three arguments in their inverse order, the defendant asserts:

(1) The fact that the defendant has not attempted to secure a reversal of the judgment in this case for excessiveness of the damages awarded to the plaintiff does not support plaintiff's argument that the error contained in Instruction No. 15 did not prejudice the defendant.

(2) The fact that the Supreme Court of the United States has held that close and doubtful cases under the Federal Employers' Liability Act should be submitted to a jury for determination if there is an evidentiary basis for a verdict in favor of the plaintiff does not support the plaintiff's argument that *this* case should have been submitted to a jury for determination.

(3) The evidence in the case at bar presented no question for submission to a jury on the issue of the defendant's negligence, whether the subject be viewed in the light of the defendant's conduct toward the plaintiff or toward a class of which the plaintiff was a member.

POINT I.

THE FACT THAT THE DEFENDANT HAS NOT ATTEMPTED TO SECURE A REVERSAL OF THE JUDGMENT IN THIS CASE FOR EXCESSIVENESS OF THE DAMAGES AWARDED TO THE PLAINTIFF DOES NOT SUPPORT PLAINTIFF'S ARGUMENT THAT THE ERROR CONTAINED IN INSTRUCTION NO. 15 DID NOT PREJUDICE THE DEFENDANT.

At pages 46 and 47 of his brief the plaintiff states: "Instruction No. 15 is a correct statement of the law and did not result in any prejudice to defendant especially where it appears that defendant makes no claim that the damages awarded were excessive." We do not propose to restate here the bases of our contention that Instruction No. 15 is argumentative. We think that it is argumentative and we have heretofore pointed out the reasons for this belief in our original brief. We do propose, however, to answer briefly the statement of plaintiff's counsel that said instruction, even if argumentative, was not prejudicial to the defendant.

That statement is patently erroneous for the following reasons:

(a) If, as we contend, Instruction No. 15 argues for the plaintiff that he should recover some verdict whether the defendant was negligent or otherwise, it is obvious that the instruction might have affected not only the size of the verdict, but also might have influenced the determination by the jury that the plaintiff should prevail at all.

To assert that an instruction which is in argumentative form in favor of the plaintiff on the subject of liability is not prejudicial to the defendant because the amount of the verdict is not excessive, when such instruction may have influenced the outcome of the case in so far as liability is concerned, is indeed an illogical statement.

(b) In a suit for personal injuries there is no method of determining the plaintiff's damages with mathematical precision. Reasonable jurors may and do differ as to the amount which should be awarded. Accordingly, the courts have deliberately limited their own supervision of the size of verdicts in such cases. If the amount awarded falls between the minimum figure which reason will support and the maximum figure which reasonable jurors would award, then the courts refuse to substitute their own judgment for that of the jurors. *Duffy v. Union Pacific Railroad Company* . . . Utah . . . , 218 P. 2d 1080. As said by Mr. Justice Wolfe in the case of *Pauly v. McCarthy*, 109 Utah 431, 184 P. 2d 123:

"The jury is allowed great latitude in assessing damages for personal injuries."

Since the minimum and the maximum amounts between which a verdict will be permitted to stand by the courts of this state may well be thousands of dollars apart, it is obviously of considerable monetary consequence to the parties where between those limits the jury fixes the damages. It would therefore seem to follow inescapably that an argumentative instruction which induces a jury to place the damages in the upper strata between such reason-

able maximum and minimum limits, as opposed to the lower strata between the same limits, has materially prejudiced the defendant. Consequently, the failure of the defendant to challenge the verdict in the case at bar for excessiveness as being above the maximum limit which the courts would approve affords no basis whatever for plaintiff's conclusion that no prejudice has resulted from an argumentative damage instruction such as Instruction No. 15.

POINT II.

THE FACT THAT THE SUPREME COURT OF THE UNITED STATES HAS HELD THAT CLOSE AND DOUBTFUL CASES UNDER THE FEDERAL EMPLOYERS' LIABILITY ACT SHOULD BE SUBMITTED TO A JURY FOR DETERMINATION IF THERE IS AN EVIDENTIARY BASIS FOR A VERDICT IN FAVOR OF THE PLAINTIFF DOES NOT SUPPORT THE PLAINTIFF'S ARGUMENT THAT THIS CASE SHOULD HAVE BEEN SUBMITTED TO A JURY FOR DETERMINATION.

Plaintiff contends that the Supreme Court of the United States has ruled that close or doubtful cases under the F. E. L. A. should be submitted to juries for determination and that jury trial is a part of the right of plaintiffs under this act. But these platitudes furnish no assistance in deciding the issue in the case at bar. Equally well settled and supported by authority are the fundamental propositions that (a) in the absence of evidence of negligence on

the part of the defendant the trial court should not submit a case to a jury for determination, and (b) the jury should be properly instructed as to the law which may require a judgment for defendant.

Mr. Justice Wolfe expressed these views in language which we cannot improve, as follows:

"It has been strenuously argued by plaintiff that this decision has deprived him of his constitutional right to a jury trial. That contention has been urged upon this court in almost every case of non-suit and directed verdict brought before us. This court is charged with the duty of protecting all of the rights of all litigants. This is especially true of those fundamental rights guaranteed by the State and Federal Constitutions. But the right to have a jury pass upon issues of fact does not include the right to have a cause submitted to a jury in the hope of a verdict where the facts undisputably show that the plaintiff is not entitled to relief." *Raymond v. Union Pacific Railroad Co.*, 113 Utah 26, 191 P. 2d 137.

The Supreme Court of the United States has recognized that there are cases under the F. E. L. A. which are non-liability cases as a matter of law.

Moore, Administrator v. Chesapeake & Ohio R. Co., 340 U. S. 573, 71 S. Ct. 428, 95 L. Ed. 294;

Eckenrode v. Pennsylvania R. Co., 335 U. S. 329, 69 S. Ct. 91, 93 L. Ed. 41;

Reynolds v. Atlantic Coast Line R. Co., 335 U. S. 852, 69 S. Ct. 80, 93 L. Ed. 400.

In that portion of his brief designated as Point II plaintiff cites nine cases decided by the Supreme Court of

the United States on facts which have no faint resemblance to the facts in the case at bar. Why the decisions of that court on different facts have the "controlling effect" mentioned at page 46 of plaintiff's brief is not said. Certainly these cases do not stand for the proposition that all F. E. L. A. cases should be decided by juries.

We respectfully submit that there is nothing close or doubtful about the alleged negligence of the defendant in the case at bar. There is an absolute void in so far as any evidence of negligence on the part of the defendant contributing to plaintiff's injuries is concerned. Plaintiff's argument that the Creamer case should have been submitted to a jury because the Supreme Court of the United States has held that other cases totally dissimilar on the facts should be submitted to a jury is unwarranted.

POINT III.

THE EVIDENCE IN THE CASE AT BAR PRESENTED NO QUESTION FOR SUBMISSION TO A JURY ON THE ISSUE OF THE DEFENDENT'S NEGLIGENCE, WHETHER THE SUBJECT BE VIEWED IN THE LIGHT OF THE DEFENDANT'S CONDUCT TOWARD THE PLAINTIFF OR TOWARD A CLASS OF WHICH THE PLAINTIFF WAS A MEMBER.

Despite the camouflage injected by plaintiff's brief, the issue to be determined in deciding whether or not this case should have been submitted to a jury cannot be obscured. The issue to be determined may be stated concretely

as follows: Is it negligent for an employer to require an apparently healthy young man to perform hard work without machinery to eliminate the labor.

The plaintiff argues that the method of icing passenger diners used by the defendant company in its operation at Ogden constitutes negligence to a class, i.e., coach cleaners; that plaintiff was a member of this class, and consequently, that the defendant was negligent as to this plaintiff. This is indeed a specious argument. We concede that the defendant owes to each and every one of its employes the duty of exercising reasonable care under all circumstances. However, the fact that the standard of care required by the law is a constant, denominated reasonable care, does not even remotely support the proposition that the quantum of care required of the defendant to each of such employes is likewise constant. One of the circumstances which determines what amount of care is reasonable care is the known characteristics of a person to be affected by the defendant's conduct. As stated in *Harper on Torts*, Section 145:

“Since the matter of the plaintiff's incapacity as bearing upon his duty to exercise care for his own safety is closely connected, in the actual cases, with the defendant's duty to use due care, mention should be made here of the latter problem. As to the repair of premises or conditions of streets, a defendant owes no greater duty toward persons possessed of physical infirmities than toward others. But if the plaintiff's infirmity or affliction is known to the defendant, the standard of the reasonable man will require him to adjust his affirmative conduct with reference to such person's infirmities, and he may be guilty of negligence for actions which the ordinary prudent

person would avoid with respect to them. The known incapacity of the plaintiff becomes one of the 'facts and circumstances of the case.' and the extent of the defendant's duty must be measured accordingly. The degree of care required is the same—the care of the ordinary reasonable man under the same or similar circumstances. But this degree of care obviously requires different conduct toward children, the sick, lame, blind, insane or intoxicated, when such incapacity is known, from that required toward adult persons of sound limb, faculty and mind. 'A sick or aged person, a delicate woman, a lame man, or a child is entitled to more attention * * * from a railroad company than one in good health and under no disability. They are entitled to more time in which to get on or off the cars; they are entitled to more consideration when crossing a street, to the end that the cars shall not run over them.' The point was further brought out in a Texas case in which a landlord, with knowledge of the plaintiff's pregnancy, entered the leased premises and in the presence of the plaintiff made an assault upon some negroes which so frightened her that a miscarriage resulted. The defendant was held responsible. Since the defendant knew of the plaintiff's disability, he should have foreseen some such harm, and he is therefore negligent. Since the risk of the particular harm was one of the very factors which made his conduct negligent, there is, of course, no difficulty with the problem of legal causation. If the plaintiff's incapacity or disability was unknown to the defendant, the reasonableness of the latter's conduct must be determined without reference thereto."

The facts and circumstances of the case at bar as disclosed by the evidence were that the plaintiff was an apparently healthy, normal young man, about 36 years of age.

He was over six feet tall and weighed in excess of 200 pounds, with at least normal muscular development. Even if it could be said (which we deny under the facts in this case) that the defendant company would have been negligent had it assigned an aged or weak person, or an individual known to be otherwise handicapped, to Creamer's task, this cannot help the plaintiff, who possessed no such known handicaps.

Mr. Justice Cardozo discussed the concept of negligence and the principles involved in the case of *Palsgraf v. Long Island Railroad Company*, 248 N. Y. 339, 162 N. E. 99, 59 A. L. R. 1253, at considerable length. He was applying the principles to a different fact situation but his analysis is equally cogent here. In that case a train of the defendant stopped at a station where the plaintiff, a woman, was standing on the platform waiting for a second train. Two men ran forward to catch the train which had stopped. The second man, who was carrying a package, jumped aboard the car but seemed about to fall. A guard employed by the defendant reached forward to help him and another guard on the platform pushed him from behind. During this activity the package was dislodged and fell upon the rails. The package, which was about 15 inches long, covered by newspaper, contained fireworks, although there was nothing in its appearance to give notice of its contents. The fireworks exploded when they fell and the resultant shock threw down some scales at the other end of the platform which struck the plaintiff. In determining that the defendant was not liable to the plaintiff, Mr. Justice Cardozo made the following remarks:

“If no hazard was apparent to the eye of ordinary vigilance, an act innocent and harmless, at least to outward seeming, with reference to her, did not take to itself the quality of a tort because it happened to be a wrong, though apparently not one involving the risk of bodily insecurity, with reference to some one else. ‘In every instance, before negligence can be predicated of a given act, back of the act must be sought and found a duty to the individual complaining, the observance of which duty would have averted or avoided the injury.’ (Citing cases) ‘The ideas of negligence and duty are strictly correlative.’ (Citing cases) The plaintiff sues in her own right for a wrong personal to her, and not as the vicarious beneficiary of a breach of duty to another.

* * * * *

“The passenger far away, if the victim of a wrong at all, has a cause of action, not derivative, but original and primary. His claim to be protected against invasion of his bodily security is neither greater nor less because the act resulting in the invasion is a wrong to another far removed. In this case, the rights that are said to have been violated, the interests said to have been invaded, are not even of the same order. The man was not injured in his person nor even put in danger. The purpose of the act, as well as its effect, was to make his person safe. If there was a wrong to him at all, which may very well be doubted it was a wrong to a property interest only, the safety of his package. Out of this wrong to property, which threatened injury to nothing else, there has passed, we are told, to the plaintiff by derivation or succession a right of action for the invasion of an interest of another order, the right to bodily security. The diversity of interests emphasizes the futility of the effort to build the plaintiff’s right upon the basis of a wrong to some one else. The gain

is one of emphasis, for a like result would follow if the interests were the same. Even then, the orbit of the danger as disclosed to the eye of reasonable vigilance would be the orbit of the duty. One who jostles one's neighbor in a crowd does not invade the rights of others standing at the outer fringe when the unintended contact casts a bomb upon the ground. The wrongdoer as to them is the man who carries the bomb, not the one who explodes it without suspicion of the danger. Life will have to be made over, and human nature transformed, before previsions so extravagant can be accepted as the norm of conduct, the customary standard to which behavior must conform.

"The argument for the plaintiff is built upon the shifting meanings of such words as 'wrong' and 'wrongful,' and shares their instability. What the plaintiff must show is 'a wrong' to herself, i.e., a violation of her own right, and not merely a wrong to someone else, nor conduct 'wrongful' because unsocial, but not 'a wrong' to anyone. We are told that one who drives at reckless speed through a crowded city street is guilty of a negligent act, and therefore of a wrongful one, irrespective of the consequences. Negligent the act is, and wrongful in the sense that it is unsocial, but wrongful and unsocial in relation to other travelers only because the eye of vigilance perceives the risk of damage. If the same act were to be committed on a speedway or a race course, it would lose its wrongful quality. The risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation; it is risk to another or to others within the range of apprehension."

In the *Palsgraf* case the defendant company owed the duty of reasonable care to all of its passengers, of which

class the plaintiff was certainly a member. But conduct which may perhaps have been negligent as to the man with the package was not negligent as to the plaintiff.

On similar principles, even if it may be said that the method used by the Depot Company for icing diners was negligent as to other coach cleaners, it is improper to permit the plaintiff to rely upon such a theory to recover for himself. In the absence of knowledge of his impaired health or any circumstances from which it may be inferred that the defendant should have known of Creamer's impaired health, there was no reason for the defendant company to perceive danger in assigning this man to the task to be undertaken. If it were a fact that the Depot Company customarily used hoisting machinery in icing diners when employes other than Creamer performed similar work, still there would have been no negligence on the part of the Depot Company in requiring Creamer to perform the task without machinery, unless danger was reasonably to be perceived in requiring *him* so to undertake the task.

It may be interesting to note the opening sentence of the annotation in A. L. R. following the *Palsgraf* case, *supra*. The annotator there states:

“The position taken in the majority opinion in the reported case that the basis of an action for negligence must be a violation of plaintiff's own right, and not merely a wrong to someone else, is elementary.”

In addition to the fallacy in plaintiff's argument pointed out above, there is a second equally conclusive reason for rejecting the plaintiff's argument. Even if it be assumed

that Creamer may rely upon negligence of the defendant toward other coach cleaners as a basis for recovering damages for loss sustained by him, his position would still be hopeless because there is no evidence of negligence as to the class to which he belonged.

There is no evidence in the record which even tends to indicate that the defendant assigned any employe to the work of icing diners under such circumstances that the defendant knew, or should have known that said employe had impaired health which rendered the work dangerous.

In any event, the duty to use reasonable care toward the members of a class requires only that amount of care which would be reasonable as to a normal member of such class, unless there is knowledge that one or more of the members of that class are in fact abnormal. This was clearly established by this court in the case of *Bennett v. Pilot Products Company*, . . . Utah . . . , 235 P. 2d 525. In that case the plaintiff had used a permanent wave lotion distributed by the defendant. She developed a dermatitis, for which damages were sought on the theory that the defendant was negligent in failing to warn her that the lotion would produce the dermatitis. The evidence disclosed that the lotion was harmless to a normal person but that it had produced the dermatitis of the plaintiff because she was allergic to a mixture of two ingredients contained in the lotion. In holding that the plaintiff had failed to make a jury question on the issue of the defendant's negligence, Mr. Justice Henroid speaking for the court said:

"We are sympathetic with appellant and her misfortune, but cannot require the merchant to assume

the role of absolute insurer against physiological idiosyncrasy. To do so also would invest the elusive ordinary prudent man with a quality of foreseeability that would take him out of character completely. Every substance, including food which is daily consumed by the public, occasionally becomes anathema to him peculiarly allergic to it. To require insurability against such an unforeseeable happenstance would weaken the structure of common sense, as well as present an unreasonable burden on the channels of trade."

The court considered the duty to foresee injury as the result of the personal idiosyncracies of the user of the product and held as follows:

"Counsel for appellant very ably urged that there was sufficient evidence to reach the jury on the question of negligence. Examination of the authorities requires that we differ, and in doing so we believe that there was no evidence to go to the jury on the question of the reasonable foreseeability of danger and harm to the normal person contemplated by the law. * * * So far as they (certain cases to the contrary) sanction recovery by an unanticipated few whose sensitivities or allergies are not reasonably foreseeable, we cannot accept them. Rather we must adhere to the philosophy enunciated by the cases reflected in respondent's citations and which was put so aptly by Dean Prosser in his work on Torts, p. 679, to the effect that: 'The manufacturer is at least entitled to assume that the chattel will be put to a normal use by a normal user, and is not subject to liability where it would ordinarily be safe, but injury results from some unusual use or some personal idiosyncrasy of the user.'"

If a merchant whose products are distributed to the public at large is not to be required to foresee injury as a

result of the personal sensitivities of his potential customers, then how can an employer be expected to exercise a greater foresight concerning his employees, who are examined by competent physicians as a part of their employment. We respectfully submit that negligence is the basis of liability under the Federal Employers' Liability Act and that the plaintiff Creamer cannot recover from the defendant in this case. If this verdict is permitted to stand, then any employer may be held negligent if he fails to foresee danger in honest toil. Such a result offends the basic principles of the economic system of this nation.

Respectfully submitted,

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