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Glenn Reynolds v. American Foundry and Machine Company : Brief of Defendant and Appellant

Utah Supreme Court

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In the Supreme Court of the State of Utah

GLENN REYNOLDS,

Plaintiff and Respondent,

vs.

AMERICAN FOUNDRY AND MA-
CHINE COMPANY,

Defendant and Appellant.

No. 7697

BRIEF OF DEFENDANT AND APPELLANT,
AMERICAN FOUNDRY AND MACHINE CO.

FILED

SEP 25 1951

Clerk, Supreme Court, ^{Utah}McKAY, BURTON, McMILLAN
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GLENN REYNOLDS,

Plaintiff and Respondent,

vs.

AMERICAN FOUNDRY AND MA-
CHINE COMPANY,

Defendant and Appellant.

No. 7697

BRIEF OF DEFENDANT AND APPELLANT,
AMERICAN FOUNDRY AND MACHINE CO.

STATEMENT OF FACTS

Plaintiff is an employee of Clarence W. Silver Company. Clarence W. Silver Company, as an independent contractor, on December 28, 1948, was doing work under contract for the defendant company in the repair of a transformer. Plaintiff sued defendant for defendant's claimed negligence. The jury awarded plaintiff a judgment of \$5,000.00 for special and general damages suf-

ferred as a result of an injury to the right hand of plaintiff, which injury occurred when a link in a chain block separated, dropping the load being lowered by the chain block.

The facts of the case are as follows: In 1937 the defendant corporation purchased and placed in operation a transformer, the core of which weighed six tons and was encased in a metal tank approximately twelve feet high, three feet in width and four and one-half feet in length. Clarence W. Silver, an electrical contractor, did the work of installing and placing the transformer in operation. At the time the transformer was purchased Clarence W. Silver recommended and subsequently directed the installation of a large I beam over the roof of the building encasing the transformer to be used as the support on which the chain block could be put for the purpose of raising and lowering the transformer core when repairs were needed. At the same time Clarence Silver directed the defendant company to purchase a six-ton chain block. (R. 121-122)

In 1937 the chain block was purchased new, and Silver was called to check the chain block by the manager of the defendant company. Silver inspected the chain block in the pattern shop, it having been just taken from the shipping package, and was "all kind of tied around so as to make a close package in shipping." (R. 132) At that time the chain block had its rated capacity stamped upon it as "six tons", and conformed to the specifications given by Silver. (R. 128) Silver then directed the boxing

of the chain block, and placed the chain block in the box in the transformer room. (R. 122-123)

In the first part of December, 1948, the transformer failed and Clarence Silver was called in to handle the repair. The core was taken from the tank by a crane, repaired and placed back in the tank and placed in operation.

Within a few days the transformer again failed and the crane was called in and the core removed. At that time it became evident that the repairs would cover a considerable period, and Silver directed that they use the chain block. (R. 140) At this time Silver knew that the chain block was being used for the first time since its purchase. (R. 140) The chain block was placed in position under the direction of Silver and the hand chain operated in accordance with the usual test made by Silver to see that the chain block was in functionable condition. The core was lowered by the crane on to the floor of the transformer building, and on the second day of the breakdown the chain block was used to raise the core and lower it back into a pan which had been prepared for that purpose. (R. 147) The core was then divided and the upper section, weighing approximately two tons, was raised up through the roof and held while repairs were made on the lower part of the transformer. (R. 148) Upon the core being repaired and assembled, the chain block was used to raise the entire six-ton weight of the core and hold it suspended while tests and infra-red treatment were given to it. (R. 150)

Approximately two weeks subsequent to the last breakdown the transformer had been repaired and action was proceeding by way of placing the transformer in the tank. The core had been raised with the chain block so that the bottom of the core was approximately fourteen feet above the floor of the transformer building.

The tank had been wheeled into position under the core and the core was being lowered into the tank. Four men were placed by Silver at each of the corners of the tank and were guiding the core into the tank. When the core had been lowered to a point where the bottom of the core had reached a point three feet below the top of the tank, a link in the chain block separated and dropped the core, and the right hand of plaintiff was struck by the 2 by 4's placed to aid in the assembling of the unit. (R. 155)

Plaintiff was taken to a doctor, where he received medical care. He lost approximately six weeks' work because of the injury. He submitted his claim to the Industrial Commission and was awarded compensation in the amount of \$1607.35. Sometime subsequent to that award this action was commenced.

There was no question of negligence involved in the operation of the chain block; in fact, Silver testified:

“Q. It came down just as evenly as you could possibly want it, isn't that correct?

“A. Well, the one thing that we were happy about in lowering it on this was that when we had lowered it previously with Mettome, with his hoist,

he would drop it about three inches at a time and the one purpose of putting this up was so we could let it down easy and slow.

"Q. And that was what was happening; it was coming down easy?

"A. Very, very easy. We were just letting it down an inch at a time.

"Q. And there was no jerking of the chain by those lowering the hoist?

"A. No.

"Q. They handled it properly in every way, in the maneuvering of the land chain and lowering it?

"A. Yes.

"Q. And when this core dropped was there any previous warning of any kind.

"A. No warning at all. It was a matter of split seconds. There was a big noise and that was the end of it." (R. 155)

The chain block was manufactured by the McColloum Hoist and Chain Company, a nationally advertised company whose products are known under the trade-name as indicated; it being a product known in the same sense in the industry as Yale & Towne, Reading and Chisholm. (R. 301, 302, 350, 351) A destructive test was made on the separated link, disclosing that the link had not been annealed, and apparently it was the only link in the chain block which had not received that treatment. (R. 175) Whether a link has been annealed or not can be determined only by a destructive test. (R. 175-178) This test

consists of cutting the link into sections, treating the exposed surfaces and subjecting the surfaces to microscopic examination.

The evidence of the experts is uncontroverted on the use of chains and customs in industry to the effect that the rating, capacity and performance of an assembled machine such as a chain block is accepted in industry, and tests for performance, capacity and inspection for satisfactory manufacture are not made before placing the machine in operation. Plaintiff's evidence was, and plaintiff's own experts testified without exception, that no test was ever made before the use of a chain block with manufacturer's rated capacity, and plaintiff's experts further testified that it was the practice to and in every instance they did rely upon the manufacturer's rated capacity.

Among plaintiff's witnesses were Clarence W. Silver, "who grew up with chain blocks" (R. 129); Niels Christensen, metallurgist for Combined Metals Reduction Company (R. 198), who stated, "Well, if the company is a reliable company you can accept the safe working load as the rated load." At Page 206 of the record, Christensen states that he had never been called upon to make a test of a chain block for his company, though the testing was the duty assigned to him by that company, and further states that it is the practice and custom for the industry and for his company to rely upon the rating of the manufacturer, and that no test is made to check the performance or capacity; further, that the

reason this is not done is because the manufacture of the entire unit of the block and chain provides the source where all various tests according to the National Safety Council are made for performance and specifications. (R. 207)

Further support of this custom appears in the testimony of Harry L. Young of the Harry L. Young Rigging & Trucking Company, and Fred Richeda of The Lang Company, who testified that the manufacturer's rating of capacity and performance of an assembled machine such as a block and chain is accepted in the industry, and tests of performance are not made before placing the machine in operation. (R. 178, 311) The only testing these experts could suggest to determine defects, particularly the latent defect in the link involved, would be a destructive test resulting in a complete loss of the machinery. (R. 178, 311)

The negligence specified by plaintiff appears at page 25 of the transcript, in Paragraph 6 of the Amended Complaint, as follows:

1. Inadequate, defective and negligent construction of the link by defendant or defendant's agent from whom the block chain was obtained.
2. Defendant's negligence in supplying a defective and inadequate chain block.
3. Failure to inspect and test the chain for tensile strength.

4. If a test was made, the test was inadequate and negligent.

5. If an adequate test was made, defendant knew of the defect and negligently and wantonly failed to notify plaintiff of the peril.

As to the performance and reliance to be placed by reason of performance on a block and chain, Fred Richeda of The Lang Company, and trained expert of many years' experience, states at Page 311 of the record:

“Well, after the load has once been taken on the chain block there is absolutely no reason to inspect the chain block, especially if it is held overnight or two weeks, the chain block has definitely proved itself by taking the load and holding.”

As indicated above, the chain block on several occasions had sustained and held the entire six-ton weight of the transformer core without evidencing or revealing any defect. As heretofore pointed out, the chain had operated perfectly over the two-weeks' period of its use and to the instant that the link failed.

STATEMENT OF POINTS RELIED UPON

POINT NO. I.

UNDER THE CIRCUMSTANCES OF THIS CASE
THERE WAS NO DUTY ON THE DEFENDANT TO
MAKE AN INSPECTION OF THIS CHAIN BLOCK
AT ANY TIME.

(a) *The chain block having been purchased from a reputable manufacturer, it is presumed that it was manufactured, assembled, inspected and tested by experts before it was ever placed upon the market.*

(b) *There is no standard of care in the evidence showing the necessity of inspection or testing before a chain block is placed in use when it is purchased new from the manufacturer.*

(c) *There is no standard or evidence of any necessity, practice or custom for an inspection of a chain block following a period of and type of use as in this case.*

POINT NO. II.

ONE SUPPLYING CHATTELS GRATUITOUSLY FOR THE USE OF ANOTHER HAS NO DUTY TO DISCOVER LATENT DEFECTS.

POINT NO. III.

THERE WAS NO EVIDENCE OF NEGLIGENCE IN PURCHASING FROM THE MANUFACTURER THE BLOCK AND CHAIN IN THIS CASE, AND THE COURT ERRED IN INSTRUCTING THE JURY THEY COULD CONSIDER THE PERSON FROM WHOM THE CHAIN BLOCK WAS PURCHASED AS NEGLIGENT.

POINT NO. IV.

THE COURT ERRED IN PERMITTING CHRISTENSEN TO GIVE HIS OPINION AS TO WHETHER

THE CHAIN BLOCK SHOULD HAVE BEEN INSPECTED AFTER IT HAD BEEN IN USE FOR A PERIOD OF FORTY-EIGHT HOURS.

POINT NO. V.

THE COURT ERRED IN REFUSING TO GIVE DEFENDANT'S REQUESTED INSTRUCTIONS 7 AND 9 AND 2, 3 AND 4.

POINT NO. VI.

THE COURT ERRED IN FAILING TO GIVE DEFENDANT'S REQUESTED INSTRUCTION NO. 1 FOR A DIRECTED VERDICT AND IN FAILING TO GRANT DEFENDANT'S MOTION TO DISMISS MADE TO THE COURT AT THE CONCLUSION OF PLAINTIFF'S CASE.

POINT NO. VII.

THE COURT ERRED IN GIVING INSTRUCTIONS NOS. 4 AND 5.

ARGUMENT

POINT NO. I.

UNDER THE CIRCUMSTANCES OF THIS CASE THERE WAS NO DUTY ON THE DEFENDANT TO MAKE AN INSPECTION OF THIS CHAIN BLOCK AT ANY TIME.

(a) *The chain block having been purchased from a reputable manufacturer, it is presumed that it was manufactured, assembled, inspected and tested by experts before it was ever placed upon the market.*

The essential theory of liability upon which plaintiff originally predicated this action is that defendant owed a duty to make an inspection and test of the chain block prior to or at the time it was first used. This theory appears both in the original complaint (Paragraph 6, R. 2) and the amended complaint (Paragraph 6, R. 25-26). It affirmatively appears, however, from plaintiff's evidence that among persons and in industries using new chain blocks there is a practice and custom to rely upon the rated capacity of the manufacturer. No test is ever made of a new chain block when the manufacturer gives it a rating. This custom clearly appears from all the testimony of the witnesses in the action, and there is no evidence to the contrary. Mr. Clarence W. Silver testified as plaintiff's witness he "grew up with chain blocks." (R. 129) The chain block in question in this action was purchased under his general supervision and direction. He saw it when it arrived at the defendant's place of business in 1937. At this time it had just been removed from the shipping package. With reference to the condition of the chain block at the time of its arrival and necessity for a test, Mr. Silver testified as follows:

"Q. You were satisfied as to the chain by the rating that it bore from the manufacturer?

"A. My experience with chain blocks had been that when they marked a chain block for six ton or three ton you could carry without any danger six ton or three ton and they always were built with a safety factor in the chain block unit itself.

“Q. Now this examining as a complete unit from the manufacturer, is it your custom, or is it the recognized practice to rely upon the manufacturer’s rating of that block?

“MR. SMOOT: I will object to that as being incompetent, immaterial and irrelevant, Your Honor.

“THE COURT: The objection is overruled.

“A. I would answer that in this way. That when you buy a chain block which you consider is a good make block my experience—I don’t know whether it is a practice, I would change the wording on you—it has been my experience over my lifetime that if you bought from a responsible chain block hoist company that if the chain block was marked six ton you could lift six ton and you never needed to worry about it.

“Q. There was never need of any test. Let me speak of your experience. There was never any need of any test of any kind? You relied upon what the factory told you. It was—

“MR. SMOOT: I will object to that as being incompetent, Your Honor, as to whether or not he needed to rely on a test.

“THE COURT: The objection will be overruled.

“A. It has been my experience, or my practice to take for granted that the manufacturer would state on the block six ton and you could lift six ton without any danger.” (R. 32)

Neils Christensen, a metallurgist of Combined Metals Reduction Company, whose duties consisted of supervis-

ing use of chains in chain blocks in this company states: (R. 198) "Well, if the company is a reliable company, you can accept the safe working load as the rated load." He further states (R. 206) that he had never been called upon to make a test of a chain block for his company although testing was the duty assigned to him, and that the reason the test was not made of all new chains was that the practice and custom in the industry and for his company was to rely upon the rating by the manufacturer. He stated that it is well known in the industry that the manufacturer has the equipment and testing devices, and makes the tests required pursuant to the recommendations of the National Safety Council both as to performance and specifications. (R. 207) To the same effect it is the testimony of Harry L. Young, of the Harry L. Young Rigging & Trucking Company, and Fred Richeda, of the Lang Company. (R. 178, 311)

As is pointed out hereafter in the brief, no question was raised in the pleadings as to the fact that the chain block was purchased from a reliable manufacturer. The only test that could be made would result in a destruction of the chain itself. Certainly it would be unreasonable to require a test of this kind. The fact that it was purchased from a well known company implies that it was assembled, inspected and tested by experts. The manufacturer has all of the devices necessary to make proper testings. The fact that it was ordered and received as a chain block with a six ton rated capacity justifies the belief by defendant and its employers that its

performance and specifications would be adequate to the uses required of it.

(b) *There is no standard of care in the evidence showing the necessity of inspection or testing before a chain block is placed in use when it is purchased new from the manufacturer.*

In the case of *Dunagan v. Appalachian Power Co.*, 33 Fed. (2d) 876, (4 CCA), among the points raised in that case was the objection of counsel for plaintiff to an instruction given by the Court for the reason that it is claimed the instruction makes the custom of other companies the test of due care. The Court said: "There is another and even stronger reason why the instruction complained of cannot be held reversible error, even if we were to give it the construction for which plaintiff contends. There was no evidence upon which to base a contention that the exercise of due care in the matter of inspection required anything in addition of what was shown to be customary, and there was not even an allegation that the defendant was negligent in matter of inspection. It is true that the test of due care is not custom or usage but what reasonable proof would require under the circumstances, but as said by Judge Knapp, speaking for this Court in the case of *Southern Railway Co. v. Miller*, 267 Fed. 376 (4 CCA):

"Evidence of custom is always competent and often highly persuasive, and in the absence of any evidence tending to show that the custom followed by others in the business did not involve reason-

able care or of evidence upon which to base a conclusion that reasonable proof would have suggested additional precaution, it should not be held for reversible error that the Court adopted what was customary as the standard."

Continuing on with their discussion as to the custom being the basis for care and a conclusive basis, the Court stated in the *Dunagan* case:

"If there was nothing upon which to base a conclusion that reasonable proofs required anything more than the customary inspection, plaintiff could not have been injured by an instruction that defendant was required to make that which was customary."

In the case of *Lowden v. Hanson*, 134 Fed. (2d) 348, the Court states:

"The equipment having been purchased from a reputable manufacturer, we are clear that the defendants could not be charged with negligence because of any structural or inherent defect which was not patent at the time of its installation. Defendants were warranted in assuming in the absence of any notice to the contrary, that the equipment was without structural defects, and it was not incumbent upon them to dismantle the appliance and separate it into its various parts for the purpose of discovering possible defects. *It was manufactured, assembled, inspected and tested by experts before it was ever placed on the market. This was implied from the fact that the manufacturer was a reputable one.* While it was the duty of defendants to inspect this appliance, it is our view that in the absence of any evidence that it was not properly functioning, *defendants were not*

required to dismantle the appliance and submit it to a microscopic inspection or the other scientific tests suggested by one of the witnesses for the purpose of discovering possible structural defects. The functioning of the switch did not indicate any defect or break, nor did it give notice or warning of any deficiency. Under the undisputed evidence we are of the view that there was no negligence in failing to discover an alleged structural defect nor in failing to dismantle and subject the instrumentality to a microscopic inspection, there being no evidence of a custom of submitting such appliances to such a test." (emphasis supplied)

Further on in the opinion the Court states:

"In *McGivern v. Northern Pacific R. Co.*, 132 Fed. (2d) 213, we said: 'These instrumentalities were in general use and met with general approval for the performance of this work. Two other carriers doing switching in Minnesota were shown to follow exactly the same practice. While custom or usage may not be controlling as fixing the standard of care it may be accepted where the custom or practice is not in itself negligent or in disregard of the safety of the employee.' In *Canadian Northern R. Co. v. Senske*, supra, the late Judge Walter H. Sanborn, speaking for this court, among other things said (201 F. 643): 'The degree of care commonly exercised by other persons engaged in the same kind of business under similar circumstances presents such a standard. * * * the best test of actionable negligence and the true standard for the measurement of ordinary care is the degree of care which persons of ordinary intelligence and prudence, engaged in the same kind of business, commonly exercise

under like circumstances. If the care exercised in the case rises to or above that standard, there is no actionable negligence.' ”

In *Grand Trunk R. R. Co. v. Ives*, 144 U. S. 408, 36 L. Ed. 485, the Supreme Court of the United States approved this charge :

“You fix the standard for reasonable, prudent, and cautious men under the circumstances of the case as you find them, according to your judgment and experience of what that class of men do under these circumstances, and then test the conduct involved and try it by that standard.”

In *Canadian Northern R. Co. v. Senske*, 201 Fed. 637, the Court states :

“These authorities, and a multitude more, sustain the established rule that the standard of ordinary or reasonable care is that degree of care (1) which ordinarily prudent persons, (2) engaged in the same kind of business, (3) usually exercise under similar circumstances. It is plain that the care which extraordinarily cautious or unusually careless persons use would not be a correct standard. Nor would the care which prudent persons engaged in other kinds of business would use be the true standard. The care a farmer or merchant would deem proper, in the absence of evidence to guide him, and would use in running an engine, or building a bridge, would be no criterion of the ordinary care exercised by persons customarily engaged in those occupations. Nor would the degree of care that prudent persons use or would use under different circumstances furnish a just criterion of ordinary care under the circumstances of a given case.”

The Court further states:

“In the absence of proof to the contrary, the legal presumption always is that each * * * company, its officers and employees, are faithfully discharging this duty.”

* * *

“When the degree of care which the railroad company actually exercised had been proved and the question arose whether or not this was ordinary or reasonable care, the legal presumption still prevailed that other railroad companies, their officers, and employees commonly exercised ordinary care in making such inspections, and the uncontradicted evidence of their customary method of making these inspections under like circumstances necessarily established, in the absence of countervailing evidence, the true standard of ordinary care by which the inspection made by the defendant must be measured.”

* * *

“The validity of the general abstract rule that the measure of care required of any employer is that degree of care which an ordinarily prudent man, engaged in the same kind of business, would have exercised under similar circumstances, is conceded.”

* * *

“In cases * * * in which there is no proof of the degree of care which other ordinarily prudent persons engaged in the same kind of business commonly use, juries may measure the care required of a defendant by the application of this rule to other facts and circumstances in evidence before them. But the best evidence of the degree of care which ordinarily prudent persons would have exercised under given circumstances is the

degree of care which ordinarily prudent persons engaged in the same kind of business, customarily have exercised and commonly do exercise under similar circumstances. And, when the evidence of this degree of care is substantial or undisputed, it furnishes the true and the best standard of ordinary care by which that actually used should be measured in all debatable cases.

“What the true standard of ordinary care is in cases of this character is an exceedingly grave and important practical question to all employers and employees. It is very important that this standard should be as fixed, certain, and well known as possible, so that employers can know before the events whether or not they are exercising the requisite care and faithfully discharging their duties. The degree of care commonly exercised by other persons engaged in the same kind of business under similar circumstances presents such a standard. The opinions and verdicts of juries, no two of which would probably agree, fixing the standard by which to measure the employers’ care after the events have happened, would necessarily be variant, uncertain, and speculative, and would furnish no reasonably certain standard of measurement whatever.

“It is not denied that exceptional cases sometimes arise in which the degree of care exercised is so clearly insufficient, or so plainly ample, that the customary use of the same degree by others in like circumstances becomes immaterial. But the case at bar is not of that character. It is one of the great multitude of cases in which the sufficiency of the degree of care exercised by the defendant was, in the absence of evidence, debatable, and in which its sufficiency must be measured by the

evidence in the case and rules of law applicable thereto. In such cases the best test of actionable negligence and the true standard for the measurement of ordinary care is the degree of care which persons of ordinary intelligence and prudence, engaged in the same kind of business, commonly exercise under like circumstances. If the care exercised in the case rises to or above that standard, there is no actionable negligence. If it falls below that standard, there is. * * *

“And where, as in this case, that degree of care is established by uncontradicted evidence, and the proof is clear that the care exercised by the defendant rose above it, it is error to permit the jury to establish in their minds a higher standard of ordinary care after the accident, a standard unknown, uncertain and speculative, and to cast the defendant in damages because the care it used did not reach that standard.”

In *Lake v. Shenango Furnace Co.*, 160 Fed. 887, at Page 895, the Court states:

“There are cases in which the act or omission at issue is in itself so clearly negligent that the fact that other persons in the same or like circumstances have been guilty of it is insufficient to modify its character or effect. * * * The defendant's act or omission was not of that character; and in such a case the true test of actionable negligence is the degree of care which persons of ordinary intelligence and prudence commonly exercise under the same circumstances. If in a given case the care exercised rises to or above that standard, there is no actionable negligence; if it falls below it there is. Hence, in an action for

damages for negligence, evidence of the ordinary practice and of the uniform custom, if any, of such persons in the performance under similar circumstances of acts like those which are alleged to have been negligently done is generally competent evidence, for it presents to the jury the correct standard for their determination of the issue whether or not the defendant was guilty as charged."

We submit in this case that there be no evidence of any negligence or different standard in the custom or practice of using blocks and chains, and there was no need for any inspection of the new block and chain before placing it in use on this occasion by the Clarence W. Silver Company.

The original position of plaintiff was that the defect in the chain was a latent one. The only test which would reveal its existence would be to cut out a section of each link and test it microscopically. The evidence produced relative to this defect is contained in the testimony of Don Rosenblatt and Christensen.

"A. Well, our examination, our microscopic examination revealed that the particular link in question had not had any normalizing heat treatment, or annealed."

"A. The two links that were adjacent to the failed link showed that there had been an annealing treatment given to those particular links.
* * * We only tested those particular links."

"A. Well, the annealing treatment is supposed to relieve stress and give the steel in question the maximum ductility." (R. 176)

"Q. An unannealed link would be more brittle than an annealed link?

"A. Yes, that is true." (R. 177)

"Q. Now, in order, Mr. Rosenblatt, to test, and make a test on every link in that chain to determine whether or not it had been annealed would you have had to go through this same process?

"A. Well, for every link you wanted to know about you would have to polish it and look at it.

"Q. And that would mean cutting out this section so that you could polish it and get it under the microscope, is that correct?

"A. Yes.

"Q. So you would have to destroy your entire chain to find out if each link had been annealed?

"A. That's correct. (R. 178)

"Q. * * * could you look at this chain as it appeared on the chain block itself * * * and by looking at it tell whether it had or had not been annealed?

"A. No, I couldn't do that. (R. 180)

"Q. * * * Can you tell from the two surfaces, the rough surfaces on Exhibits 5 and 6, whether the section you cut out would be a part of the weld of that link?

"A. No, I couldn't say whether it is the weld or not."

* * *

"Q. Are you able to make any determina-

tion yourself as to whether the break did or did not occur in the weld?

"A. Not from just looking at it, no. If we had all of the link. There are some pieces that are missing now. The thing could be edged, microedged, and the weld area would stand out as a different color than the parent metal. That is a test that could be made if it was important to determine whether the fracture was in the weld."
(R. 182.)

The following is the testimony of the witness Christensen:

"Q. Do you have an opinion as to whether an unannealed link in the chain of the size and description of defendant's Exhibits 4 and 5 there, whether such an unannealed link in such a chain would constitute a latent defect in that chain?

"A. Quite definitely I would say that an unannealed link would be a weak link in the chain and would be a menace to its safe use."

* * *

"THE COURT: I think you asked in reference to a latent defect. You claim something, I guess, for the word 'latent' don't you?

"MR. SMOOT: Yes.

"THE COURT: I don't believe Mr. Christensen has answered in reference to that.

"Q. Now would an unannealed link, the fact—let me put it this way—the fact that a link is unannealed be observable by a mere inspection?

"A. That is very doubtful.

“Q. And would there ever be an occasion, or would there ever be a situation under which you could observe and detect a link being unannealed merely by looking at it?

“A. I doubt it very much.

“Q. Now, would a proof test of a chain be likely to reveal the presence of an unannealed link by breaking?

“A. A proof test would not reveal the unannealed link in a new chain, very probably.” (R. 199)

“Q. Excuse me. Assuming a chain block was new in the year 1937—

“MR. BURTON: Bought new.

“Q. Bought new and laid idly for a period of eleven years and some months, would that have had any influence upon the steel in that?

“A. There might be very minor changes, but I doubt if that would have much influence on it.”

An important and striking fact in the case at bar is that this testimony with respect to the standard of care, that is the accepted standard in the industry concerning whether an inspection was made of a new chain, was the only criteria of reasonableness before the jury. This testimony came from, and was produced by plaintiff and his witnesses. It was corroborated by the witnesses of the defendant. There was nothing before the jury from which any conclusion could be made, except that reasonable men acting prudently in the industry, in which they are expert and qualified and with regard to their own

safety and the safety of the personnel working with them, did not make a test for any inspection of new chain blocks.

The defendant Company is not in the position of an insurer. It is only bound to act and to exercise the care of an ordinary man. The rule is stated in *Section 388 of the Am. Law Institute Restatement of the Law of Torts*, Vol. 2, p. 1039:

“One who supplies directly or through a third person a chattel for another to use, is subject to liability to those whom the supplier should expect to use the chattel, with the consent of the other, or to be in the vicinity of its probable use, for bodily harm caused by the use of the chattel in the manner for which, and by a person for whose use it is supplied, if the supplier

- (a) knows, or from facts known to him should realize, that the chattel is or is likely to be dangerous for the use for which it is supplied;
- (b) and has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition; and
- (c) fails to exercise reasonable care to inform them of its dangerous condition or of the facts which make it likely to be so.”

Defendant is not subject to the liability prescribed by this section. It did not fail to exercise reasonable care to inform plaintiff of the dangerous condition of the chain, or of facts which make it likely to be dangerous. It did not know or have any facts to indicate to it that

the chattel was or was likely to be dangerous for the use for which it was supplied. It did not have any reason to believe that the plaintiff would not exercise the same precautions that defendant would exercise acting for its own safety in the use and examination of the chain block. Defendant owed no duty to make an inspection of the chain block, because it was not unreasonable for it, exercising the prudence of a reasonable person, to rely upon the manufacturer's rated capacity. The standard of care required of defendant in the circumstances present in this case was the same standard which other suppliers and users of chain blocks had in similar circumstances. All of the evidence in the case was to the effect that such persons, under such circumstances, do not make an inspection or test of chain blocks.

This is not a case where it can be said that defendant owed a higher degree of care than is usually exercised by persons in the industry. The jury had before it only one standard of care and only one criteria for the determination of whether defendant acted as a reasonable person. That criteria and that standard was, as hereinbefore stated, to the effect that tests of chain blocks, supplied by responsible manufacturers, are not made and need not be made. The jury could only properly infer, on the evidence before it, that defendant could not have been negligent in failing to make an examination or test of the chain block in question.

The Court committed no less than two errors in its instructions concerning the duty of the defendant in this regard. In Instruction No. 4 the Court stated:

(R. 41) "You are instructed that it was the duty of the defendant in this case to use reasonable care to determine and ascertain whether or not the chain block in question was reasonably safe for the plaintiff and other workmen to use in the performance of the work in question. Therefore, you are instructed that if you find by a preponderance of the evidence that the defendant did not make a reasonable inspection of the chain at any time prior to the happening of the accident, and that by such inspection the defect could have been ascertained and discovered, and if you further find that such failure upon the part of the defendant, if you find that they did fail to make such inspection, was not such conduct as would have been performed by a reasonably prudent person under the circumstances, and that the failure of defendant to make such an inspection and the lack of discovery of the defect, if any, in the chain immediately before the happening of the accident, was the proximate cause of the breaking of the chain and the resulting accident and injury to the plaintiff, you will then find the issues in favor of the plaintiff and against the defendant."

In Instruction No. 5 the Court stated:

(R. 42) "In determining whether or not defendant acted as a reasonably prudent person, under the circumstances involved in this case, you may take into consideration the condition of the chain block at the time it was purchased, the circumstances as to whom it was bought from, the care and use it had received from the time it was purchased and until the time of the accident in question, its apparent mechanical and physical condition when put into use by defendant's employees, the rated capacity and the weight of the

transformer it was to be used to lift, the height and duration of the lift that was to be made, and the circumstances under which it was to be used, and from these matters and all the evidence in the case, you are to determine whether or not the defendant's conduct was such as would or would not be that of a reasonable prudent person, under the circumstances."

The first error in these instructions is the implication that the jury could find from the evidence that defendant was obligated to make an inspection; that is, that there was before the jury a question as to whether the standard of care was higher or greater than the conduct which defendant admittedly was a party to in the instant case. In other words, defendant did not make an inspection of the chain block prior to the time of its first use, but neither did any other person under similar circumstances. The instruction to the jury implied that they could find that there was such a duty upon defendant. There was no evidence to support such an instruction. The Court obviously erred in this regard. No standard of care to require such a test or examination was established.

(c) *There is no standard or evidence of any necessity, practice or custom for an inspection of a chain block following a period of and type of use as in this case.*

As heretofore indicated, the plaintiff changed his theory of liability in this case in the middle of the trial. In his pleadings (Paragraph 6 of the complaint and amended complaint, R. 2, 25-26) he stated that there was

a duty to make an inspection and test of the chain block prior to the first use. As the trial progressed it became apparent that by reason of the standard of care established in the industry itself, and the reliance on the manufacturer's rating capacity, no duty could be established in this regard. Plaintiff was unable to produce proof as heretofore stated that a standard of care required inspection and tests prior to the first use, so he shifted to the position that defendant owed to the plaintiff the duty to inspect and test the chain during the period of its use. It should be kept in mind that the chain block was used on the second day of the breakdown to raise the core and lower it back into a pan which had been prepared for that purpose. (R. 147) Then the upper section of the core which was approximately two tons in weight was raised up through the roof and held while repairs were being made on the lower part of the transformer. (R. 148) The chain block was used to raise the entire six ton weight of the core and held it suspended while tests and infra-red treatment were given to the core. (R. 150) This use had been for a period of several days prior to the time when the link separated.

During all of the time plaintiff and other employees of the Clarence W. Silver Company were using the chain block with employees of the defendant company. Under the circumstances plaintiff now asserts the claim that defendant had an obligation to inspect the chain block during its use.

This change of position was asserted through the

testimony of the witness Christensen. The record shows at Page 219 that this witness was excused, having completed his original, direct and cross examination. The court then proceeded to hear the testimony of the plaintiff himself. Before direct examination of the plaintiff was completed the court recessed for the noon hour. (R. 231). On the same day of the trial Judge Van Cott called counsel for both sides into his office at 1:30 p.m. The judge asked Mr. Smoot if plaintiff's case was completed as far as introducing evidence of negligence was concerned. Being assured that it was, the judge then told the plaintiff's counsel that unless there was further evidence to show an obligation by defendant to inspect the chain block, a non-suit would be granted.

Thereupon the record shows (244) at the completion of Reynold's testimony that Mr. Smoot asked for a five-minute recess to talk to the witness Christensen again, and at Page 245 Mr. Smoot makes the statement that he would like to ask leave of court to bring back Mr. Christensen because of the further investigation and inspection he had made of the evidence. These facts are called to the court's attention to show the court what occurred during the noon hour so that the court may properly appraise the testimony of Mr. Christensen and to appraise the shift in position of plaintiff during the trial.

At Page 252 of the record Christensen presents the following testimony:

“Q. The testimony concerning the difficulty

and the probabilities which you have just now been called back to the stand about was brought up and discussed as you got back into the Court here at 2:00 o'clock?

"A. That's correct. Yes, that is what I said.

"Q. And that was after your conversation then with Mr. Smoot and Mr. Wilkinson?

"A. No. I, they asked me to come back and make a further examination of the link, which I did."

The purport of Mr. Christensen's testimony, after being recalled to the stand, is to the effect that it was probable a crack had developed in this particular link prior to its having separated. When that occurred, Mr. Christensen did not know (R. 249); in fact, his statement is this:

"Q. Now inasmuch as you have some opinion on this can you tell me at which hour of the forty-eight this started to separate?

"A. Not being God I wouldn't know, no.

"Q. * * * At which point, as this core was being raised the last time, did it start to separate, if you know?

"Q. I don't know.

"Q. You don't know that it separated during the time that it was hanging there for forty-eight hours?

"A. I merely said that it was highly probable, due to the nature of the material if it had a crack it would become evident a considerable time before it broke."

At Page 247 of the record the Court permitted Christensen to testify over defendant's objection in the following respect:

"Q. In your opinion, should this have been inspected after it had been used for a period of forty-eight hours, holding a weight of six tons?

"A. Well, all I can say on that in view of the type of machinery it would certainly have been the most wise precaution to examine it to determine if there was any defect before the final use."

Now, we ask the Court to contrast this testimony with the testimony which was given by Christensen in the morning on cross-examination and at the conclusion of his cross-examination on Page 209 of the record:

"Q. * * * assuming * * * a chain is bought new and then it is placed in a box built for that purpose and it isn't used at all until on or about the 16th day of December, 1948. It is used for the first time and it is taken out of this box. Now at that time the rated capacity, the six ton load, is raised and lowered perhaps a foot or so while they put a pan under the core of the transformer. With that much use there is no reason for any further check of the block and chain at that time? I mean any test; to take it down and make any further proof test after just raising and lowering the rated capacity of the block and chain?

"A. Well if the rating, I will say was correct, it would be natural to assume that the chain would support the six ton load, but—

"Q. Now—

"MR. SMOOT: Let him finish.

"THE COURT: Well, I think perhaps he had finished and the other wasn't responsive.

"Q. Mr. Christensen, after this block and chain was engaged in raising and lowering a six ton load there is no need to take the block down and go out and make some test of it at that time, was there?

"A. Under ordinary circumstances, no.

"Q. And in the process of repairing this transformer over a period of two weeks when perhaps a one-half ton load is moved in raising the top part of the transformer off, then as the lower part is repaired it is once again assembled, say ten days later, then this same six ton load is raised and held for forty hours while the core is infra-red treated, there would be no need for any further proof testing between the period of two days and on the same job as an ordinary practice?

"A. Not if you can accept the rating. That is the big question. If you can accept the rating of it.

"Q. Of the factory?

"A. Of the manufacturer." (R. 211)

From the foregoing the witness Christensen has definitely established the fact that there was no reason for examining or testing the chain block after it had been delivered to Silver or after it had been used up to the time the link failed.

We have heretofore pointed out in Christensen's

testimony that the crack may have developed for the first time on the last pull in raising the transformer core, and once again we would like to point out the testimony on Page 249:

“Q. You don’t know that it separated during the time that it was hanging there for forty-eight hours?

“A. I merely said that it was highly probable, due to the nature of the material.”

It was on this testimony that Judge Van Cott reversed the position he had taken prior to the noon recess, and it was on this testimony that he permitted the jury to speculate as to whether a test and examination should have been made before the lift was made for the last time. The very mention of such a principle indicates the absurdity of any such duty or obligation. Certainly nothing is given in the evidence to support such a contention. All of the testimony, including that of Christensen himself, is to the effect that no test or examination need be made where a chain block is worked only to the extent indicated in this case.

The evidence is clear that a chain block is accepted at the manufacturer’s rating and is never tested or examined other than was done in this case to see that it is operating properly. The evidence is clear that no reasonable examination would have revealed the defect in the lack of annealing of the link. If the weld itself was defective, that would not appear until a crack had developed. There is no evidence that even after com-

panies have abused a block and chain, an examination is made of the machinery or of the chain, link by link.

Is this Court to establish as a degree of negligence in industry the failure to examine a block and chain after it has been used for forty-eight hours on a load within its rated capacity? How could this Court establish such a rule when there is no evidence that industry itself has ever required such an examination, or that such a use could possibly damage a chain or require inspection? There was nothing about the use of the chain block that was improper or that the use exceeded a normal one of equipment of this kind. There was no evidence whatever of any standard of care or any necessity of an inspection of a chain block after it had been used only five or six times for the very purpose for which it was constructed and supplied. There is not even any evidence to the effect that had any examination been made any defect would have been apparent. We submit that the court erred in permitting the jury to speculate that some mythical requirement existed that defendant had the duty to make such inspection. The most favorable consideration that can be given to Mr. Christensen's testimony is that a "wise precaution" might be to make an inspection of the kind he indicates. He does not know of such a standard in the industry. Such an inspection *might have* disclosed a crack that *might have* developed since the first use.

POINT NO. II.

ONE SUPPLYING CHATTELS GRATUITOUSLY FOR THE USE OF ANOTHER HAS NO DUTY TO DISCOVER LATENT DEFECTS.

In Instruction No. 4 the trial judge instructed the jury:

"It was the duty of the defendant in this case to use reasonable care to determine and ascertain whether or not the chain block in question was reasonably safe for the plaintiff to use in the performance of the work in question."

Under the facts and circumstances in this case this instruction was clearly erroneous and the giving of it was reversible error.

There is no question in the evidence as to the fact that the defendant offered the chain block for the use of plaintiff and plaintiff's employer as a gratuity and not by reason of any contractual arrangement between either defendant and plaintiff or defendant and plaintiff's employer. Defendant permitted the chain block to be used as a convenience, a favor, to the Silver Company. In fact, it was Mr. Silver himself who made the decision that the chain block should be used rather than the hoist which had previously been used to lift the transformer. The liability in such an instance is discussed in *Section 392 of American Law Institute Restatement of the Law of Torts (Restatement on Torts, Volume 2, Pages 1064-1068)*:

“One who supplies to another, directly or through a third person, a chattel to be used *for the supplier’s business purposes*, is subject to liability to those for whose use the chattel is supplied or to those whom he should expect to be in the vicinity of its probable use for bodily harm caused by the use of the chattel in the manner for which and by persons for whose use the chattel is supplied:

(a) If the supplier has failed to exercise reasonable care to make the chattel safe for the use for which it is supplied, or

(b) If the supplier’s failure to give those whom he should expect to use the chattel the information required by the rule stated in Section 388 is due to his failure to exercise reasonable care to discover its dangerous character or condition.”

The editors of the Restatement specifically point out that the words “for the supplier’s business purposes” do not apply if the appliances supplied are furnished as a gratuity and not for the supplier’s business purposes. (*Ibid*, p. 1068)

“ * * * it is understood that the person who is to do the work is to supply his own instrumentalities, but the person for whom the work is to be done permits his own tools or appliances to be used as a favor to the person doing the work, the tools and appliances are supplied as a gratuity and not for use for the supplier’s business purposes.”

Illustration No. 3 on pages 1068 and 1069 applies to the facts and circumstances in this case:

“A, a building contractor, contracts to erect a building for B, and erects the necessary scaffold. A employs C, a sub-contractor to do the masonry work. C in performing his work as sub-contractor uses the scaffold for the business purposes of A and C. The business having been completed according to the contract, B desires to have some additional work done on the exterior and employs C by an independent contract between B and C. To do this work it is necessary for the use of the scaffold. A says to C, ‘Here is the scaffold; you may as well use it.’ C’s use of the scaffold in doing this additional work is not for a business purpose of A.”

In the case at bar, the Silver Company was employed as an independent contractor to do the electrical repairing work required as indicated in the evidence. The Silver Company employed a hoist operated by a truck to lift the transformer out of the metal container both during the period of the initial repair and during the first lifting of the lengthy remodeling and repair which followed. The decision to use the chain block was made by Mr. Silver. The chain block was used as a gratuity as far as the defendant was concerned, defendant not having obligated itself in any manner to furnish this kind of equipment. According to the Restatement’s own interpretation of Section 392, therefore, the special liability therein prescribed is inapplicable to the facts of this case. Plaintiff must rely upon the general liability of the supplier of a chattel as elsewhere defined. (See Restatement 388 and Point I (b) of this brief.) In this regard it has been heretofore pointed out that the liabil-

ity described in Section 388 of the Restatement is absolutely inapplicable to the facts in this case because defendant did not know of any facts not in the possession of the plaintiff which caused him to believe that the chattel was unsafe or dangerous for the intended use. Plaintiff cannot bring himself under the rule stated in Restatement Section 388 for the reason that the evidence clearly established the fact to be that any defect in the chain could not be discovered except by a destructive test. Such a test would not be reasonable.

Instruction 3(a) (R. 40) is substantially a word for word recital of the rule stated in Section 392. Since it is inapplicable to the facts of this case, it is obviously misleading and plainly reversible error.

This argument is presented for consideration in the event the Court disagrees with the position taken by appellant in Point I. In any event, there was no standard proved here which requires any inspection, especially in view of the affirmative custom to rely upon manufacturer's rated capacity.

POINT NO. III.

THERE WAS NO EVIDENCE OF NEGLIGENCE IN PURCHASING FROM THE MANUFACTURER THE BLOCK AND CHAIN IN THIS CASE, AND THE COURT ERRED IN INSTRUCTING THE JURY THEY COULD CONSIDER THE PERSON FROM WHOM THE CHAIN BLOCK WAS PURCHASED AS NEGLIGENT.

In Instruction No. 5, the Court enumerated various elements which the jury could take into consideration in determining whether defendant was negligent. Included in these elements was, in the Court's words, "The circumstances as to whom it (the chain block) was bought from." The only implication possible from this instruction was that there was evidence to support the proposition that defendant was negligent in purchasing the chain from an unreliable company. Not only is there no claim in the complaint or in any pleading in this action that the defendant relied upon this theory of negligence, but the record is absolutely barren of any evidence to support such a claim if it had been made. The jury could not infer from any fact presented to it or any issue properly before it that the supplier of the chain block to the defendant was not of the most satisfactory reputation and the highest integrity. To permit the jury to speculate that there was something in "the circumstances as to whom it was bought from" and the defendant's conduct with reference to those circumstances that permit an inference of negligence is a clear and reversible error.

The chain block concerned in this law suit was manufactured by McColloum Hoist & Chain Company, a nationally advertised concern whose products are well known in the trade. In fact the product is known in the same sense in the industry that Yale & Towne, and Reading & Chisholm are known. (R. 301, 302, 350, 351) Plaintiff himself did not make any allegation in his complaint which placed in issue the integrity of the

company from which defendant purchased the chain. The allegations of negligence in plaintiff's original complaint appear in Paragraph 6. There plaintiff alleges that the chain was constructed by the defendant and that the lack of proper construction by the defendant was a cause of action complained of. (R. 2) In the amended complaint, plaintiff stated that the breaking of the link was the proximate result of the "negligent construction by the defendant or by defendant's agent from whom defendant may have obtained said chain block." (Amended complaint, paragraph 6, R. 25-26) The fact of the matter as developed at the trial is as herein stated that the defendant obtained the chain block from McCollum Hoist & Chain Company and not any agent of its own. The only negligence could be a failure to use reasonable care in selecting a chain block of this kind. As to this question there is absolutely no evidence except that McCollum Company was a nationally known, reputable company.

This matter assumes importance in the case at bar because of the uncontroverted and undisputed evidence that there was an affirmative custom in the trade to rely upon the stated capacity rating of the manufacturer. The effect of this custom is discussed elsewhere in this brief. The Court's error with reference to the point under consideration should be considered in connection with the innuendos by plaintiff's counsel to the effect that the McCullum Company was not reliable. (See, for example, (R. 173.) Certainly the Court should not

have undertaken to enlarge the issues with reference to kinds of negligence at issue in this action, and should not have given an instruction which permitted the jury to infer negligence upon the theories not supported by any proper evidence or any evidence at all.

POINT NO. IV.

THE COURT ERRED IN PERMITTING CHRISTENSEN TO GIVE HIS OPINION AS TO WHETHER THE CHAIN BLOCK SHOULD HAVE BEEN INSPECTED AFTER IT HAD BEEN IN USE FOR A PERIOD OF FORTY-EIGHT HOURS.

The objectionable testimony by Christensen was adduced after plaintiff's change of position as indicated in Point No. 1 (c). Plaintiff's counsel asked:

“Q. Now in your opinion, according to what you would consider to be reasonable care under a situation where it is holding six tons, where men are working in the same room, do you have an opinion as to whether or not that chain block and the links therein should have been inspected superficially? That is, by looking at them after this period of forty-eight hours hanging about which we have already mentioned?

“A. Well—

“MR. BURTON: I object to that as incompetent, immaterial and irrelevant and asking for an improper conclusion and as one, if anyone should make it, should be made by the Court and jury.

“THE COURT: The objection is sustained.

"Q. In your opinion, should this have been inspected after it had been used for a period of forty-eight hours, holding a weight of six tons?

"MR. BURTON: We renew our same objection. It is the same question on which Your Honor has just made a ruling.

"THE COURT: I think it is somewhat different. The objection will be overruled. * * *

"A. Well, all I can say on that in view of the type of machinery it would certainly have been the most wise precaution to examine it to determine if there was any defect before the final use."

It is submitted that the first ruling of the Court on this question was proper, and that the second ruling was clearly erroneous. The function of the jury is to establish a reasonable standard of care. The testimony of Christensen prior to this question was that his opinion was the crack could have developed during the period of use and that it might have been apparent if the chain had been examined prior to the break. There is no way to determine, according to Christensen, whether the crack would have been visible thirty seconds, several hours or several days prior to the break. The following questions and answers are indicative of his frame of mind on the subject:

"Q. Now inasmuch as you have some opinion on this can you tell me at which hour of the forty-eight this started to separate?

"A. Not being God I wouldn't know, no.
(R. 249)

He further stated that he had never tested a chain—

that he was a metallurgist and that the testing of chains as such was not part of his job. (R. 249) It plainly appears, therefore, that the opinion of Mr. Christensen as to whether or not an inspection would be reasonable under the circumstances here has no more validity and is no more expert than the opinion of any juror on the subject. Certainly Christensen was not qualified as an expert to usurp the function of the jury and make it a determination upon the very fact that it was bound to ascertain as the trier of fact.

No facts were ever presented to the jury to justify Christensen's answering a question of this kind. Even if there had been facts to justify a hypothetical question, this one was improperly asked. If the first question had been as to whether the witness had an opinion as to whether such and such action was reasonable in such and such circumstances, he could not have answered in the negative without having to admit that such an opinion was based upon neither his own experience nor the practice of reasonable men in the industry. As the question was asked, the requisite safeguards for expert testimony were absolutely wanting.

POINT NO. V.

THE COURT ERRED IN REFUSING TO GIVE DEFENDANT'S REQUESTED INSTRUCTIONS 2, 3, 4 7 AND 9.

The law related to the duty of defendant under the circumstances of this case is discussed in Points I, II and

III of this brief. No purpose would be served by reiterating the requested instructions and the applicable law at this time. The defendant's requested instructions 2, 3, 4, 7, and 9 correctly state the applicable law and failure to give these instructions was erroneous.

POINT NO. VI.

THE COURT ERRED IN FAILING TO GIVE DEFENDANT'S REQUESTED INSTRUCTION NO. 1 FOR A DIRECTED VERDICT AND IN FAILING TO GRANT DEFENDANT'S MOTION TO DISMISS MADE TO THE COURT AT THE CONCLUSION OF PLAINTIFF'S CASE.

As is discussed in Points I, II and III of this brief, plaintiff did not establish a standard of care, the violation of which was negligence. Nor did plaintiff establish any breach of duty which defendant owed to him under the circumstances here present. These questions are discussed in detail heretofore in this brief and no purpose would be served in duplicating a discussion of Appellant's position at this point.

POINT NO. VII.

THE COURT ERRED IN GIVING INSTRUCTIONS NOS. 4 AND 5.

The error in giving Instructions Nos. 4 and 5 is discussed in Point I of this brief. No purpose would be served in duplicating that discussion here.

However, even assuming that there was evidence before the jury that the inspection referred to in the

instructions and under Point I could have been made or should have been made, the instruction of the court is erroneous on the further ground that it is void of any criteria or standards or considerations as to what factors the jury might consider in determining what the reasonable standard was. In other words, the jury could not ascertain from the instructions what conduct, if it believed the evidence was true as to such conduct, it could find to be unreasonable under the circumstances. It was left to speculate not only as to what evidence would have to be believed, but what standard could be applied and what would constitute the deviation from that standard. The primary purpose of instructions to the jury is to furnish guide posts in established criteria of negligence. These guide posts are absolutely wanting in the instructions by the court in the case at bar.

For the reasons stated in the Argument in Point No. I and as herein stated, Instructions Nos. 4 and 5 are clearly erroneous.

CONCLUSION

This court should enter its order setting aside the verdict and dismissing plaintiff's complaint. In any event the errors committed require granting defendant a new trial.

Respectfully submitted,

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