

1951

# Glenn Reynolds v. American Foundry and Machine Company : Brief of Plaintiff and Respondent

Utah Supreme Court

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Wilkinson & Smoot; Attorneys for Plaintiff and Respondent;

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# In the Supreme Court of the State of Utah

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GLENN REYNOLDS,

*Plaintiff and Respondent,*

vs.

AMERICAN FOUNDRY AND MA-  
CHINE COMPANY,

*Defendant and Appellant*

Case No.

7697

**FILED**  
OCT 27 1951

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Clerk, Supreme Court, Utah

BRIEF OF PLAINTIFF AND RESPONDENT,  
GLENN REYNOLDS

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WILKINSON & SMOOT,  
*Attorneys for Plaintiff and  
Respondent*

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BRIEF OF PLAINTIFF AND RESPONDENT,  
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## STATEMENT OF FACTS

Appellant's statement of facts may be accepted with the following important exceptions and additions:

1. On page 4 of appellant's brief it is stated, "At the same time Clarence Silver directed the defendant company to purchase a 6 ton chain block (R 121-122.)" The

actual situation is expressed at R 95, 167 and at the bottom of R 121. Mr. Silver advised Mr. Mattingly, defendant's employer, to get a Yale and Towne chain block that would lift 6 tons. Mr. Silver knew from his own experience that a Yale and Towne product could be relied upon. This was his particular recommendation.

2. On page 5 of appellant's brief in the middle of the page we read, "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." There was no testing nor inspecting for defects in the chain either by the defendant or Mr. Silver (R 142).

3. Exception is taken to the following statement of appellant as found on page 7 of its brief: "The chain block was manufactured by the McCollum 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 a Yale and Towne, Reading and Chrisholm. (301-302, 301, 351)" This statement has no value unless it is intended to show that the reputation of the McCollum Company for the producing of sound and reliable equipment is the same as the companies whose names are quoted. The evidence does not support this proposition. At R 301, 302 Mr. Richeda says that while he is familiar with the names of companies of competitive products he is not familiar with the reputation of the products of McCollum Hoist and Chain Company. Likewise at R 350, 351 Mr. Young says he used the products of this company twenty years ago, but he does not know of their general reputation.

4. On pages 8 and 9 of the appellant's brief is a discussion of the lack of custom in the industry to test and inspect new chain blocks. In every instance that such testimony was given, it was given over objection and without setting a foundation that makes it material to this case, namely, the custom of inspecting and testing an instrumentality that is supplied an invitee workman to be used for the supplier's business purposes. Since the defendant's liability must rest upon the unusual care incident to this particular relationship such evidence of custom without such a relationship is without value.

5. On page 8 of the appellant's brief it states that Mr. Christensen never tested a chain block for his company "though the testing was the duty assigned to him by the company." Appellant appears to have overlooked Mr. Christensen's testimony at R 250 to the effect that others in his company had been assigned that particular work.

6. On page 9 of appellant's brief appears the following: "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)." Appellant appears to have overlooked Mr. Christensen's testimony (R 197, 198, 212, 255) to the effect that a proof test could have been made and had it been made upon the particular chain in question, the defect in the link that broke would have been revealed by its breaking. Had there been no such defect, then twice the rated or safe working load could have been held by the chain without its destruction. To reach its point of destruction, a load four times the rated capacity would have had to be applied.



7. On page 10 of appellant's brief, Mr. Richeda is quoted to the effect that once a full rated capacity is held by a chain block for any length of time it is proven and need not be further inspected. There is other testimony to the contrary by Mr. Christensen as follows (R 255):

"Q. Now do we understand if you take a brand new chain and to use it, not at double the rate, but at just its rated capacity and use it for a period not to exceed 50 hours out of a period of 3 weeks that now you are going to have some kind of examination made? Have you ever heard of such a practice at your company or any other company?

"A. I certainly have. As I stated before a chain block is the most abused piece of machinery that is probably used."

8. There is no evidence showing the general reputation for reliability of the products produced by the McCollum Hoist and Chain Company. The evidence is clear, however, that the chain block in question was produced by that company and the link broke either because of a defective weld or because the link was <sup>un</sup>annealed, or possibly both defects had a bearing on the failure of the link. It is further clear that had this chain block been subjected to a proof test, which is not a destructive test, but a test that all reliable manufacturers give such products, and a certificate of which test all careful vendees require from the manufacturer, such a proof test would have broken the defective link and thus removed such a dangerous instrument from service.

There is no evidence that the manufacturer made a proof test or any other kind of test and the evidence is



undisputed that the defendant made no test whatsoever, nor any kind of inspection.

Appellants contend that the use of the chain block for 48 hours in suspending the dead weight of the core while infra-red treatments were given was a test. In view of the evidence as to the purpose of a proof test, the jury was quite justified in ignoring Mr. Richeda's extravagant statement that such was a test.

9. The evidence is clear and uncontroverted that if each link of the chain had been carefully inspected for cracks in the weld, a crack would have been seen in the weld of the link that broke. Mr. Christensen says that the crack probably appeared, "a considerable time before it broke." (R 249, 250) Mr. Richeda, defendant's witness, says the link "had probably been broken at the time that the chain was made" (R 316 line 6), and a link by link inspection of chains is not an uncommon and unheard of practice (R 248, 310).

It is further undisputed that had the chain been put to a proof test, the weakness would have been manifested by breaking. These inspections and testing were never made either by the manufacturer nor by the defendant.

10. Concerning the relations of the parties, the facts are these: In December, 1948 Mr. Silver, as an independent electrical contractor was employed by the defendant to repair the defendant's transformer. Eleven years prior thereto Mr. Silver's company installed this transformer for the defendant. At that time Mr. Silver made a recommendation to the defendant that it acquire and have on

hand in case of an emergency a Yale and Towne Chain Block that would lift the 6 ton core of the transformer. The defendant purchased from the McCollum Hoist and Manufacturing Company through one of its affiliated companies a 6 ton rated chain block, and for eleven years this chain block was available on defendant's premises for the particular purpose of lifting the 6 ton core when necessary. This chain block was never used until the break down of the transformer in December, 1948. When Mr. Silver commenced the repair work he sent a number of his employees to defendant's place of business to do the work, among whom was the plaintiff. Since about 200 men were thrown out of work pending the repair of the transformer, there was a great sense of urgency on the part of Mr. Silver and the defendant which resulted in a high degree of co-operation between their respective employees. For one or two reasons it was mutually decided that the quickest way to lift the core from the transformer tank was to bring in a truck hoist instead of using the chain block, whereupon the defendant immediately employed and later paid a Mr. Mettome to do this work. It should here be observed that in the defendant's contract with Mr. Silver it was in no way contemplated that he should furnish any hoist equipment, and the fact is that the defendant furnished both the truck hoist and the chain block which was later used. It was while the plaintiff and his fellow employees were still in the process of repairing defendant's transformer that defendant's chain block broke because of a defect in one of the links. These are facts upon which the evidence shows little, if any, dispute and they are reiterated here because appellant has based

certain arguments on factual premises contrary to those here stated.

## STATEMENT OF POINTS RELIED UPON

### POINT NO. I

UNDER THE CIRCUMSTANCES OF THIS CASE THERE WAS A DUTY ON THE DEFENDANT TO TEST AND INSPECT THE CHAIN BLOCK ACCORDING TO THE BEST TESTS AVAILABLE.

(a) *The particular relations of the parties in this case were such as to place a duty in the defendant to test and inspect the chain block.*

(b) *Even if the chain block was purchased from a reputable manufacturer (which is not conceded in this case) it cannot be presumed that the chain block was adequately inspected and tested by the manufacturer unless the vendee obtained from the manufacturer a certificate to the effect that it had been so tested and inspected. However, because of the particular relations of the parties in this case such a presumption, even if it were justified, <sup>would</sup> ~~did~~ not relieve the defendant itself from a duty to adequately inspect and test.*

(c) *There need be no evidence of a standard of care showing the necessity of inspection or testing before a chain block is placed in use when it is purchased new from the manufacturer, other than the relations of the parties to the instrumentality, the type of work involved, and the*

*danger to life and limb involved by the use of the instrument if defective. Once these are in evidence the jury may then apply the reasonably prudent man doctrine.*

*(d) To establish his case sufficiently to go to a jury, it is not necessary in this case for plaintiff to show any particular practice or custom to inspect or test chain blocks.*

## POINT NO. II

ONE SUPPLYING A CHATTEL FOR THE USE OF ANOTHER AS WAS DONE UNDER THE CIRCUMSTANCES OF THIS CASE HAS A DUTY TO DISCOVER LATENT DEFECTS THEREIN.

## POINT NO. III

THERE WAS EVIDENCE OF NEGLIGENCE IN THE DEFENDANT IN PURCHASING FROM THE MANUFACTURER THE CHAIN BLOCK IN THIS CASE AND THE COURT DID NOT ERR IN INSTRUCTING THE JURY AS IT DID IN INSTRUCTION NO. V.

## POINT NO. IV

THE COURT DID NOT ERR IN PERMITTING MR. 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 48 HOURS.

## POINT NO. V

THE COURT DID NOT ERR IN THE MATTERS MENTIONED IN APPELLANT'S POINTS NUMBERED V, VI AND VII FOR REASONS ALREADY DISCUSSED HEREIN.

## ARGUMENT

### POINT NO. I

UNDER THE CIRCUMSTANCES OF THIS CASE THERE WAS A DUTY ON THE DEFENDANT TO TEST AND INSPECT THE CHAIN BLOCK ACCORDING TO THE BEST TESTS AVAILABLE.

(a) *The particular relations of the parties in this case were such as to place a duty in the defendant to test and inspect the chain block.*

The relations of the plaintiff and defendant were such as to place an especially high degree of care in the defendant toward the plaintiff with reference to the safety of the instrumentality which defendant furnished plaintiff. In spite of appellant's view to the contrary, respondent at the time of his injury was engaged in the business of servicing an instrument for the defendant, on defendant's premises, at defendant's urgent request, was using an instrumentality furnished by the defendant, and was using it along with his fellow employees and employer for the particular purpose for which it was supplied by the defendant and, at the time, operated by defendant's employees as they worked in



co-operation to get the work done for which Mr. Silver and his employees had been called.

It appears to the respondent that the vital questions in this case are: What, if any, is the liability of a vendee of an instrumentality, in which there is a defect from the time of its manufacture by the vendor, after the vendee in the furthering of his business interest supplies it to a third party who is injured as a result of the defect? Does such a supplier have the same duty of inspecting and testing as the manufacturer under all situations? Or does he have the same duty under limited situations, or does he have any duty at all with respect to the instrumentality?

The questions above have arisen very frequently where the supplier is furnishing elevator service to those who use the service to transact business in the building which the elevator serves. This situation is so common and the cases arising therefrom so numerous, that elevator cases are treated in legal treatises as a subject by itself which fact should not blind us to the basic legal questions which are present regardless of what the particular instrumentality may be. In these cases the law has placed a duty of a high degree of care upon those who would invite anyone upon their premises for business purposes and then place at the invitee's disposal or for his service an instrumentality, especially where the defects, if any, are latent and not readily observable by the invitee but which could be detected by the invitor by the best tests available.

In 18 Am Jur. 528, we read:

“The owner or operator of an elevator is not excused from the diligence otherwise exacted of him

by the fact that the elevator in question was constructed by a competent and skillful manufacturer, because the manufacturer is to be considered a mere agent or servant in its construction, for whose want of care, the owner or operator is responsible. The obligation of care and foresight rests on the person who has had the elevator constructed and he cannot shift it from himself to another. Therefore, if an innocent person suffers injuries by reason of some defect in the mechanism, the owner or operator is generally liable for the injuries, unless the defect or default was latent and could not have been discovered by a careful examination according to the best tests reasonably practicable."

It appears, therefore, that the negligence of the manufacturer in the construction of an instrumentality is imputed to anyone who later, as owner, supplies it for the use of another where the supplier has a pecuniary or business interest. The authors of the above quotation arrive at this conclusion by suggesting that the producer is an agent or servant of the supplier in the construction of the instrumentality. Although this is one way to approach the problem, the cases generally have developed a theory that deals directly with a supplier's responsibilities regardless of how he acquired the instrumentality. In developing a theory of responsibility for a supplier the courts have not been concerned as to how the supplier obtained the instrumentality, or how long the defendant has had it, or whether it has been in use; neither have the courts been concerned whether the supplier has retained control of its operation, or has placed it in plaintiff's hands as bailee to operate. These matters are merely incidental to the one controlling and dominating fact for which they look, viz., whether the



defendant has supplied the plaintiff, or the plaintiff's employer, with an instrumentality under circumstances in which not only the plaintiff is being benefited, but also in which the defendant has a pecuniary or business interest, and whether the supplier first took whatever steps were reasonably necessary to see that the instrumentality was free from defect and was capable of performing the job for which it was furnished.

This problem is treated rather exhaustively in 44 A.L.R. 1048 (1926) where under subheading IV is discussed the "Liability of contractee with respect to injuries resulting from defects in instrumentalities furnished for the purposes of the stipulated work."

It will be noted from this annotation that the New York Supreme Court of Appeals in the leading Coughtry case emphasizes that the plaintiff was injured while employed by the contractor working as an invitee on defendant's premises and scaffolding erected by the defendant, facts which the court thinks established (1) the business interest of the defendant and (2) the implication that defendant represents the structure to be safe since it was supplied by defendant for the express purpose of inducing the men who were to do the work to go upon it. This principle is well stated in a recent California case *Moran vs Zenith Oil Co.*, 206 P2d. 679 (June 7, 1949):

*"When the occupant of land knowingly permits a person to enter the premises for the purpose of performing acts which the workman has been employed to do, the proprietor is obligated to exercise reasonable care for the protection of the toiler."*

*He must supply a reasonably safe place in which the work is to be done and must furnish and maintain such tools and appliances as are necessary and reasonably safe for use in the operations. A laborer so employed is chargeable with neither a concealed nor a latent defect in the equipment supplied. In the event he is injured as a result of a latent defect in the instrumentalities furnished him of which he is ignorant, he may recover damages for resulting injuries, if it is shown that the employer, licensor or proprietor knew or by the exercise of reasonable care should have known of the defect and has failed to effect a repair thereof or to warn the workman.* (italics supplied)

“ \* \* \* Appellant invited respondent to work upon its premises and furnished him with its own instrumentality which proved to be in disrepair. That the defect was not readily apparent is established by the fact that the faulty cable was subjected to the usual inspection before use, once by appellant’s employee, McGee, in the presence of the crew foreman and again by the latter’s crew on the day of the accident. When on the latter occasion it was scraped with a knife, shiny steel appeared beneath the rust. It cannot be said that the rust covering the cable was itself an indication of imminent peril. Many witnesses testified that all cables in the area accumulate rust after short exposure to the elements. Concededly, appellant may not have known of the dangerous condition of the cable, *but on the facts established it cannot be said that the jury was arbitrary in finding that by the exercise of reasonable care appellant could have discovered the peril* and thus have prevented injury to any employee. McGee [supt. for appellant] testified that the cable had been hanging in the derrick in excess of five years and to his knowledge had never been

greased or oiled against the elements *or tested for tensile strength*. In addition, there was expert testimony that other operating oil companies serviced their hanging cables every two or three years to prevent corrosion and deterioration. Such lack of diligence to prevent injury to workmen falls below the *high standard of care required in employing those who are to work under circumstances involving a high risk to personal safety.*" (italics supplied)

An earlier California case, but still quite recent is *Sheward Et Al vs Bullock's Inc. Et Al* (120 P2d 142). The plaintiff Mrs. Robert Sheward, while sitting in a metal chair in the beauty parlor of defendant, Bullocks, for the purpose of receiving a treatment, was precipitated to the floor when the front right leg of the chair was broken. She sustained serious personal injury. Among other things the court said:

"Plaintiffs base their cause of action upon the alleged negligence of appellants in the manufacturing and assembling of the cast iron chair which the latter had sold to Bullock's, Inc. some nine months before plaintiff received her injuries. *On receipt of it, Bullock's carefully inspected the chair and during all of the time the chair was in the beauty parlor, it underwent tests for its strength and soundness.* Bullock's had an employee weighing 250 lbs. to test the chair twice weekly by riding back and forth across the floor. He also washed, oiled and inspected it at the same time. *Such care exemplified the duty imposed upon the vendee of a manufacturer.* Re-statement of the Law of Torts, Section 396.

If the same degree of care which was used by Bullock's in testing the chair had been exercised by defendant in the

case now before the court, the weakness in the link would have been discovered, and we repeat the court's words: "Such care exemplified the duty imposed upon the vendee of a manufacturer." In other words the duty of testing and inspecting by the best means available is definitely imposed upon the supplier of an instrumentality where the supplier has a business interest.

The views of Harper on Torts at Section 105 and the cases and annotations referred to above have been adopted by the restators of the Law of Torts, Section 392 which is quoted in appellant's brief at pp 38-39. In commenting on sub-paragraph 2, Section 392 the restators make this statement:

"Section 392 states the rule under which a peculiar liability is imposed upon one supplying chattels for another's use because of the fact that the use is one in which the supplier has a business interest. A person so supplying goods is required not only to give warning of dangers which he knows are involved in the use of the article, or which, from facts within his knowledge, he knows are likely to be so involved but also to subject the article to such an inspection as the danger of using it in a defective condition makes it reasonable to require. The additional duty of inspection thrown upon the person so supplying chattels for a use in which he has a business interest as compared with the absence of any such duty when he has no business interest in the use for which the chattel is supplied, is analogous to the duty of inspection imposed upon one who permits another to come upon his land for his business purpose and the absence of such duty where the permission is granted for any other reason."

Section 392 together with the restator's comment as above quoted was cited with approval by the Supreme Court of Ohio in the case of Hilleary vs Bromley Et Al (January 1946) 64 NE 2d 835. This case is especially instructive here because of the facts:

"In 1940 the defendants \* \* \* were partners \* \* \* and were engaged in the business of furnishing, selling and applying roll siding on dwelling houses.

"Prior to April 6, 1940 they agreed to apply siding on a dwelling house on Hasack Street in the City of Columbus. The defendants in turn entered into a sub-contract with the plaintiff whereby the latter agreed to apply the siding on the house in question, and the defendants agreed to furnish the plaintiff, for such purpose, equipment consisting of ladders, jacks, and planks.

"Pursuant to such agreement, the defendants furnished and delivered to the plaintiff, at the site where the siding was to be applied, the equipment above mentioned, with the knowledge that the ladders so furnished were expected to bear the weight of one or two men, the jacks, the planks and sufficient material which might weigh about 75 lbs., to cover the surface being worked upon.

"The plaintiff inspected the ladders each day he used them but discovered no defects therein. There was no inspection of the ladders to determine the weight, stress or strain which they would bear except by the manufacturer thereof, and the evidence discloses no specific inspection of the ladder in question by defendants for any purpose. The ladders were painted by the defendants after they



came into their possession and before they were delivered to the plaintiff, which, to some extent, obscured the grain of the wood.

“On April 6, 1940, the fourth day after the work had been started on this job, the plaintiff placed three of the ladders against the side of the house approximately ten feet apart. The jacks were hooked upon and suspended from the upper rungs of the ladder and in turn supported two planks extending between the ladders. While the plaintiff and a helper were standing on one of these planks, suspended between an end ladder and the middle ladder, the inside rail or upright of the end ladder broke into the third rung and then split at the rung down past fourth rung and out between the fourth and fifth rungs, with the result that the plank upon which the plaintiff was standing and the plaintiff himself were precipitated to the ground, a distance of about sixteen feet. Plaintiff’s foot was severely injured, resulting in a permanent impairment.

“A subsequent examination of the ladder rail indicated that the split followed the grain of the wood. The defendants claim that the ladders had been inspected before they were delivered to the plaintiff, *but the record discloses no evidence of any particular inspection by any particular person.*

“The plaintiff brought this action to recover damages for his injuries alleging in his petition that they resulted from the negligence of the defendants in furnishing him a ladder which was defective and inadequate for the purpose for which it was to be used. \* \* \* ”

The court upholds the plaintiff’s views concerning liability and gives a well reasoned opinion for so doing. In

view of its length we shall not quote further from the case but urge its careful consideration upon the court.

The principles thus far discussed concerning a supplier's duties toward the users of a chattel which is supplied in the furtherance of the supplier's business interest are especially applicable where there is great potential danger of serious injury and loss of life if the chattel fails in doing the thing for which it is supplied. In the case at bar the chattel which is supplied was furnished to lift and suspend over a number of workmen a weight of 12,000 pounds of a relatively bulky mechanism, that is, bulky in relation to the amount of space left in which the men could work in the small building which housed the transformer, and also bulky in relation to the size of the men themselves. To emphasize the peril of the situation we need only reflect what would have happened to the men below if the link had broken a few moments sooner when the core had not yet started into the container. What chance would the men below have had to escape being crushed to death?

With reference to the importance of considering the presence of great danger and its relation to the amount of care required, our Supreme Court has said in the case of *White vs Pinney*, 108P2 249:

"Of course what constitutes 'reasonable care' or the care that would be exercised by a person of ordinary prudence may vary with the nature of the instrumentality employed, that is, the care must be proportionate to the probability of injury that may arise to others. For example, in cases where wires carry a dangerous current of electricity or where explosives are handled, and the result of negligence



might be death or serious accidents, a greater care is required because of the danger inherent in the instrumentality. With such things an act may well be negligence which would not be such with instrumentalities of less potential danger to others. Where the danger is great the care exercised must be commensurate with it. The degree of care required in law is proportionate to the dangers that reasonable men would apprehend under the circumstances. Failure to exercise such degree of care is negligence, and negligence is the gravamen of the action."

(b) *Even if the chain block was purchased from a reputable manufacturer (which is not conceded in this case) it cannot be presumed that the chain block was adequately inspected and tested by the manufacturer unless the vendee obtained from the manufacturer a certificate to the effect that it had been so tested and inspected. However, because of the particular relations of the parties in this case such a presumption, even if it were justified, <sup>would</sup> did not relieve the defendant itself from a duty to adequately inspect and test.*

This is <sup>in</sup> ~~an~~ answer to appellant's Point I (a).

Appellant's general statement under this sub-heading at the bottom of page 12 of this ~~brief~~ <sup>its</sup> is neither a correct statement of fact concerning the manufacturer, nor is it a correct statement of the law as applied to this case. As heretofore mentioned under 3 of respondent's exceptions to Appellant's statement of facts there is no evidence supporting the proposition that the McCollum Hoist and Manufacturing Company of Downers Grove, Illinois had the general reputation for producing reliable products. For

*defendant's statement is without merit*  
facts showing that ~~such an assumption is not supported~~  
~~by the evidence~~, see discussion hereafter under Point III.

However, under the particular facts of this case, the law does not permit the defendant to shift his responsibility to the manufacturer even if it had purchased a Yale and Towne chain block, as Mr. Silver requested them to do, or any other make regardless of reputation. A leading case supporting this proposition is *Hegeman vs Western Railroad Corporation* 13 NY 9; 64 Am. Dec. 517, (1855). In that case plaintiff was "injured by the car in which he was seated, being wrecked through a defect in the axel." The court said:

"Two questions were presented for the consideration of the Jury: (1) Was there a test known to and used by others and which should have been known to a skillful manufacturer, by which the concealed defect in the axel of the car should have been detected; and if so, then (2) Was the injury to the plaintiff the consequence of that imperfection? There was evidence tending to establish these facts, which the jury have found; and the question returns, 'Can the defendant, who neither applied the test nor caused it to be applied by the manufacturer insist that this accident could not have been avoided by the utmost degree of care and skill in the preparation of the means of conveyance,' or 'That they used all precautions, as far as human care and foresight would go, for the safety of the plaintiff, as one of their passengers'? It seems to me that there can be but one answer to the question.

"It was said that carriers of passengers are not insurers. This is true. It is also said that they [the defendants] were not required to become smelters

of iron or manufacturers of cars in the prosecution of their business. This also must be conceded. What the law does require, is that they shall furnish a sufficient car to secure the safety of their passengers, by the exercise of the utmost care and skill in its preparation. They may construct it themselves, or avail themselves of the services of others; but in either case, they engage that all that well-directed skill can do has been done for the accomplishment of this object. *A good reputation upon the part of the builder is very well in itself, but ought not to be accepted by the public, or the law as a substitute for a good vehicle. What is demanded, and what is undertaken by the corporation, is not merely that the manufacturer had the requisite capacity but that it was skillfully exercised in the particular instance.* (Italics supplied) If to this extent they are not responsible, there is no security for individuals or the public.

“It is perfectly understood that latent defects may exist, undiscoverable by the most vigilant examination, when the fabric is completed, from which the most serious accidents have and may occur. This is well known, as the evidence in this suit tended to prove; and the jury have found that a simple test (that of bending the iron after the axle was formed and before it was connected with the wheel) existed by which it could be detected. This should have been known and applied by men ‘professing skill in that particular business.’ It was not known, or if known, was not applied by these manufacturers. It was not used by the defendant, *nor did they inquire whether it had been used by the builders.* (Italics supplied) They relied upon an external examination, which they were bound to know would not, however, faithfully prosecuted, guard their passengers against the dangers arising

from concealed defects in the iron of the axel, or in the manufacture of them. For this omission of duty, or want of skill, the learned judge held, and I think correctly, that they were liable."

The annotation at 64 AM. Dec. 525 shows that this doctrine is well established in New York and that the text book writers adopt it and reject the contrary view held by Michigan as unsound.

This case is quoted extensively with approval by a California case, *Treadwell vs Whittier* (1889) 22 Pac 266.

On page 15 of appellant's brief it states that "no question was raised in the pleadings as to the fact that the chain block was purchased from a reliable manufacturer." Reference to plaintiff's paragraph 6 of his complaint as amended will show the allegation that "the breaking of said link was a direct and proximate result of the inadequate, defective and latent construction by the defendant or its agent from whom it obtained said chain block."

(c) *There need be no evidence of a standard of care showing the necessity of inspection or testing before a chain block is placed in use when it is purchased new from the manufacturer, other than the relations of the parties to the instrumentality, the type of work involved, and the danger to life and limb involved by the use of the instrument if defective. Once these are in evidence the jury may then apply the reasonably prudent man doctrine.*

This sub-heading is in answer to appellant's Point I (b).

Appellant's general statement under Point I (b) is incorrect in that it fails to recognize that the standard of care is determined by the particular relations of the parties, the evidence concerning which is ample in this case.

Appellant then quotes from some cases supporting the idea that the custom of other companies is the test of due care. Here again appellant fails to see significance in the relations of the parties in the case at bar. In each of the cases cited by appellant there is a master-servant relationship where custom has had an important bearing on setting a standard of due care, although even in such cases custom is only a criteria. In negligence cases other than master-servant cases Mr. Justice Holmes' statement in 189 US 468 has been the generally accepted doctrine: "What usually is done may be evidence of what ought to be done, but what ought to be done is fixed by a standard of reasonable prudence, whether it usually is complied with or not." For an excellent discussion of the subject see 68 ALR 1400. On page 1403 of this annotation where the annotator is discussing negligence cases generally, there is cited a Michigan Case under the sub-heading Elevators, which is very instructive. We quote:

"In 209 Michigan 385, 177 NW 139, where the death of an elevator passenger had resulted from a defect in a U-bolt, which bolt had been in use eighteen years although defective when installed, it appearing that every ninety days, meanwhile, the elevator had been inspected in the customary manner by professional inspectors; that 'it was not the practice or custom of elevator inspectors, in making inspections, to take out bolts of this character for inspection or examination; that not only was this



not the custom, but that such a thing had never been heard of in practice.' The court held in view of some expert testimony as to the variability of metals and the need of inspecting those articles upon which human life depends, that the customary inspection was not conclusive on the court or jury."

Although appellant's quotations under the sub-heading now under discussion are master-servant cases, a careful reading of all of each of the cases cited will show additional facts, circumstances, and distinctions from the case at bar which further prevent them from being good authority to overcome the results of the trial court in the case now before the court.

Appellant's citation of the Grand Trunk Railroad Company vs Ives on Page 19 of its brief is also quoted on page 1402 of the article in 68 ALR referred to above. When one reads the balance of the sentence quoted in appellant's brief, together with the entire opinion of the court, one can well understand why the annotator at p 1402 says: "It is questionable whether the fact of the mere custom of railroads as to warnings at street crossings was actually the point under consideration, or adopted by the court as the standard." The annotator observes that if mere custom was the point under consideration, then it is inconsistent with later rulings of the Supreme Court.

On pp 23-25 of appellant's brief, there is quoted some testimony of Don Rosenblatt to the effect that it would be necessary to destroy a link if it were to be tested as to its being annealed. And on pp 25-26 Mr. Christensen's testimony is quoted to the effect that a new chain block—any

new chain block—could be given a proof test without revealing necessarily an unannealed link. We have no argument with this, nor need we be concerned with it. Respondent is not required to show that the defect was an unannealed link. All he had to show was that there was a defect—any kind of defect—in the link and that the defect would have been revealed by a test known to the industry. And Mr. Christensen testified that a proof test would have revealed the defect by breaking the defective link. (R 211, 212)

The remainder of appellant's argument under Point II (b) is based on the premise that the standard of care was the same as the custom elsewhere. The discussion above has attempted to show that (1) There is no evidence showing any custom of parties in a similar relation as plaintiff and defendant herein, and (2) even if there were such evidence, it would not be controlling, but only influential on the jury.

(d) *To establish his case sufficiently to go to a jury, it is not necessary in this case for plaintiff to show any particular practice or custom to inspect or test chain blocks.*  
(c)

This point is in answer to appellant's Point I ~~(d)~~.

Appellant appears to find fault with plaintiff for changing theories during the trial. If it is censurable to learn of facts during the trial, of which plaintiff and his counsel were not aware prior thereto, then appellant is justified in this attack. Neither the plaintiff nor his counsel knew that the defect was in the weld until after the conference in Judge Van Cott's chambers. This meeting with



Judge Van Cott did leave plaintiff's counsel with the definite impression that as long as the defect appeared to be latent he was not going to permit the case to go to the jury. The judge's views, we believed, were in error in view of the cases cited herein, but we realized our case would be prejudiced at that stage of the proceedings unless the defect could be shown to be one observable by the unaided eye. With this thought in mind Mr. Wilkinson took the link and the section that had been cut from it, to Mr. Christensen and asked him to look at them—and it was the first time he had had such an opportunity—to see if there was anything about the link that would indicate a defect other than the defect of excessive brittleness or lack of annealing. After examining both pieces he unequivocally said that the break was not from the lack of annealing but from a defective weld. This was a surprise to us, but one which we came to welcome, because of Judge Van Cott's restricted view of defendant's duties. Mr. Christensen and Mr. Richeda thereafter both testified that a defect in the weld very probably would have been observed by inspection before the break. (R 246-251, 315, 316)

Appellant's counsel bring this matter up, they say, so that the court "may properly appraise the testimony of Mr. Christensen and to appraise the shift in position of Plaintiff during the trial." We welcome the court's appraisal of these facts. The trial judge and jury took due note of it also. But we hasten to emphasize that the basic facts and theories of this case were not changed by this new information. On the contrary, it gave emphasis to them, namely, that there was a defect not only observable

by a known test to which the chain block could and should have been put, but also a defect which could have been found by a link by link inspection.

Appellant says that the holding of the dead weight of the transformer core for 48 hours was a sufficient test to relieve defendant from its duty to test. It has already been shown, however, that the industry considers a proof test one which subjects the chain to twice its rated capacity and a destructive test one which submits the chain to four times its rated capacity. Can it be possible that appellant actually believes that where the risk of human life and limb is involved we can accept as a test of this instrument's capacity the lifting and holding for 48 hours the exact weight at which it is rated without taking any particular stress during that time? Do they actually argue that where the risk of human life and limb is involved there should be no effort to determine to some extent whether there is a margin of safety to protect against unusual stresses and strains as the chain moves over the wheel or strains from other causes? Do they argue that this is a test at all?

It may be that an employee in an employee-employer relationship is accustomed to take a risk with instruments furnished by his employer and by that custom he may learn to make due allowance for defects and so act accordingly. But where plaintiff is a business invitee of defendant and defendant furnishes him an instrumentality to do the work which he has been called to do by the defendant and the work is of such a nature that the instrument must be sound or lives and limbs may be risked, then that plaintiff is entitled under the law to a protection considerably greater than the "test," so called, that the appellant advocates.

## POINT NO. II

ONE SUPPLYING A CHATTEL FOR THE USE OF ANOTHER AS WAS DONE UNDER THE CIRCUMSTANCES OF THIS CASE HAS A DUTY TO DISCOVER LATENT DEFECTS THEREIN.

This point is in answer to appellant's Point No. II.

When Appellant says that the chain block was furnished plaintiff as a gratuity and not in furtherance of a business interest, it appears to base such a conclusion on (1) the supposition that "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," and (2) the supposition that because Mr. Silver used the instrument that was acquired and supplied by the defendant for this purpose that it was a gratuity, and therefore the defendant had no business interest therein.

The first supposition above is directly contradictory to the undisputed evidence of Mr. Silver at R 100 wherein it is stated that the defendant employed and paid for Mr. Mettome's service to do the first hoist work. Mr. Silver did not employ Mr. Mettome. (see also R 138).

The second assumption above indicates a misunderstanding of what constitutes a business interest of the defendant and rather than labor what to us appears obvious and what has heretofore been discussed we shall submit it.

### POINT NO. III

THERE WAS EVIDENCE OF NEGLIGENCE IN THE DEFENDANT IN PURCHASING FROM THE MANUFACTURER THE CHAIN BLOCK IN THIS CASE, AND THE COURT DID NOT ERR IN INSTRUCTING THE JURY AS IT DID IN INSTRUCTION NUMBER IV.

This point is in answer to appellant's Point No. III.

Cases have already been cited and quoted herein on the questions raised under this sub-heading of appellant's argument. It has also been noted herein that plaintiff included in his complaint (Paragraph 6 as amended) this matter of negligence in the defendant in the acquiring of the chain block. Appellant says further that "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."

In answer to the above we submit the following facts from which the jury could make such an inference:

1. The chain block, while in new condition, broke with a load exactly equal to its rated capacity.

2. Mr. Christensen's testimony as found at R 213 beginning on line 38 and reading to R 215 line 21 to the effect that because of the size of the chain and the kind

of metal used, "the manufacturer overrated the chain very considerably."

3. Neither Mr. Christensen, nor Mr. Silver, both of whom had used and been around chain blocks for many years knew or had heard of the McCollum Chain and Manufacturing Company prior to their experience with the chain block in question. (R 172, 167, 301-302) Nor did Mr. Young know of its reputation. (R 350)

4. The weld was defective.

5. The link was unannealed.

6. The chain was never submitted to a proof test. There is little, if any, doubt that such a test would be given by a reputable company in view of plaintiff's exhibit A. The following is taken from page 568 of said exhibit:

#### "PROOF TESTS

6 (a) All chains shall be proof tested by subjecting it to the proof test load prescribed in Table I for the respective size chain, and when so tested it shall stand these loads without showing any defects.

(b) When requested the manufacturer shall furnish a certificate of proof test to the purchaser or his representative."

In connection with the above, Mr. Christensen testified, as has already been noted, that had this particular chain been put to a proof test, it would have broken (R



211 line 26, to R 212 line 7). It is further observed that the defendant did not produce any evidence of having acquired from the manufacturer a certificate that the chain block had been proof tested.

Reference is made to Mr. Christensen's testimony (R 195) concerning plaintiff's Exhibit A from which I quote: "The publications of this society are regarded as of the highest class and as recommendations for methods of testing and care of machinery of this type."

#### POINT NO. IV

THE COURT DID NOT ERR IN PERMITTING MR. 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 48 HOURS.

This point is in answer to appellant's Point IV.

The question which appellant claims is in error is found at the top of page 45 of appellant's brief. The objection by appellant to the question prior thereto which appellant quotes on page 44 of its brief was sustained. The question under consideration then is: "In your opinion, should this have been inspected after it had been used for a period of 48 hours holding a weight of 6 tons."

Appellant's objections to this question are as follows:

1. That Mr. Christensen was not an expert in this field,

because "the testing of chains as such was not part of his job" as a metallurgist,

2. That an expert may not testify as to probabilities,

3. That there were no facts in evidence upon which to base such a question,

4. That the question was phrased improperly and,

5. Their objection expressed on page 46 in the last paragraph under Point No. IV but which is not sufficiently clear to us for us either to admit or deny.

Objection 1 is without merit because although Mr. Christensen does not test chains as such he has tested welds and materials exactly similar to a chain (R 250). Furthermore his education and long experience in the field of metallurgy eminently qualify him as an expert concerning the properties of metals generally. (R 193, 194)

As to Objection 2 we submit that experts may testify as to probabilities.

Concerning Objection 3 there is evidence to the effect that the core was 6 tons in weight, all of which was suspended by the chain block 48 hours shortly prior to the occasion when the link broke (R 103, 151).

If there is any merit to appellant's Objections 4 and 5 above they certainly did not prejudice the appellant's case in view of Mr. Christensen's answer, the court's instructions to the jury, and all the other evidence upon which the jury could soundly base its verdict.



## POINT NO. V

THE COURT DID NOT ERR IN THE MATTERS MENTIONED IN APPELLANT'S POINTS NUMBERED V, VI AND VII FOR REASONS ALREADY DISCUSSED HEREIN.

## CONCLUSION

This court should enter its order affirming the judgment.

Respectfully submitted,

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Respondent.*