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O. K. Clay v. Stephen L. Dunford et al : Brief of Appellant

Utah Supreme Court

Joe P. Bosone; A. H. Hougaard; Attorneys for Plaintiff and Appellant;

7705

In the Supreme Court

of the State of Utah

O. K. CLAY, Administrator of the Estate of ARNOLD KARTCHNER, also known as ARNOLD G. KARTCHNER, also known as ARNOLD GRANT KARTCHNER,
Plaintiff and Appellant,

vs.

STEPHEN L. DUNFORD, PAUL H. STEVENS, BURNS L. DUNFORD and L. CLAYTON DUNFORD, doing business as THE DUNFORD BREAD COMPANY,
Defendants and Respondents.

Case No. 7705

BRIEF OF APPELLANT

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STATEMENT OF FACTS

Arnold G. Kartchner came to his death on the 24th day of June, 1950, following an automobile accident which occurred on that date at about the hour of 4:50 o'clock P.M. He left surviv-

ing him as his only heirs-at-law two children, Edna Smith, a daughter, and Dean Kartchner, a son. The plaintiff, O. K. Clay, was appointed by the District Court of Salt Lake County as the administrator of his estate, and, as such administrator, brought this action to recover damages from the defendants growing out of said accident. It is claimed by the plaintiff and the children of the deceased that the death of the deceased was caused by the negligence of one Montell Eccles Mangum, who at the time of the accident was driving a bread truck in the business of the defendants who operate the Dunford Bread Company. A trial was had before a jury and a verdict of no cause of action was returned. The accident occurred on the south side of 13th South Street in front of the deceased's home at No. 316 East 13th South Street. Briefly stated the material facts are as follows:

A map Exhibit "A" was prepared by Frank J. Cossey a member of the Engineering Department of Salt Lake City (T. 149). The map is drawn to a scale of one inch to 10 feet. The traveled portion of 13th South Street is covered with asphalt. On the north side of the street the asphalt extends over to the north sidewalk. The distance between the south edge of the north sidewalk and the north edge of the south sidewalk is 50 feet (T. 151-152). The distance across the asphalt portion is 40 feet. The distance from the north edge of the south sidewalk to the south edge of the traveled portion of the highway is 18 feet (Exhibit "A.") There is an irregular strip of asphalt which extends beyond the main traveled portion of the highway. The south irregular edge of the asphalt extends to a point approximately 10 feet north of the north edge of

the south sidewalk. This ten feet consists of dirt, some gravel, and some weeds and is not used for motor vehicle travel.

Officer Peterson of the Salt Lake City Traffic Department made an investigation of the accident. He testified (T 57) that the macadam or hard portion of 13th South is approximately 41 feet extending from the sidewalk on the north; that south of the hard portion of the road, there is approximately 9 feet of dirt, gravel, and shoulder; that the impact occurred 167 feet east of an extended curbline on the east side of 3rd East, and 3 feet from this extended curbline north toward the road; that from the north edge of the south sidewalk to the south edge of the hard portion of the road is approximately 9 feet (T 57-60); that the station wagon was approximately 5 feet wide and was parked within one foot of the sidewalk facing easterly (T. 58). The Dunford bread truck was 99 feet east of the point of impact and partly on the shoulder of the road and facing the sidewalk (T. 59). The officer said (T. 60) that he determined the point of impact from scuffed marks, scraped marks on the station wagon itself, dented door handle on the left front door, brush marks along the fender and hood, the car itself was dusty and the marks were very recent; it was brushed clean, the dirt and dust in several places on the fender and hood had been brushed clean. There was a rear vision mirror on the side of the left front door that had been broken off and was lying on the left front fender of the station wagon (T. 60).

On the extreme right front of the Dunford truck there was a slight dent and brush marks about 5 feet 9 inches from the ground; on the right front door post there was a deep

impresson of what we believed to be specks of fresh blood and small portions of flesh; pictures of the automobiles involved were taken by Officer Snell. Exhibit "C" is a photograph of the Kartchner station wagon parked in front of his home (T. 45). Also it will be noted from Exhibit "E" that the defendants' driver had ample space to have avoided hitting the deceased in this action had he been keeping a proper lookout. The picture shows that if two cars were traveling abreast and going east, north of the station wagon that they would still not have been on the main traveled highway in this position (T. 81-85). Exhibit "D" is a photograph of the bread truck where it came to a stop after the accident (T. 48). It will be observed from this photograph that the left front wheel is slightly off the hard surfaced portion of the road and the distance between that point and the south sidewalk is indicated on the photograph. Exhibit "B" shows the interior of the bread truck and certain spots and marks testified to by Officer Peterson on the outside of the truck (T. 63). We found brake marks of the bread truck on 13th South that extended from a point approximately 37 feet west of the rear wheels of the bread truck in a slanting direction toward the curb (T. 64). 13th South has a rather gentle slope off toward the South on the south side of the road; the north side of the road is more or less level. The brake marks of the Dunford truck lead to the station wagon which showed a rather slow arc in the shoulder up along side the station wagon. The tracks started in a slow turn going away from the hard surface of the road and then gradually came back toward the hard surface (T. 67). The tracks started about 100 feet west of the station wagon and went east toward the station wagon

(T. 68). The point of impact was off from the hard surface of the road (T. 69). At the time of impact, the tire marks of the bread truck were moving away from the station wagon; that would be the general direction (T. 70). Officer Peterson placed upon the Exhibit "A" the general course of the tire marks at the point they left the hard surfaced portion of the highway up to the point of impact with the station wagon. These marks are indicated by the red pencil marks starting at the irregular south edge of the asphalt, then turning to the south over the shoulder of the road, then back again toward the hard surfaced portion of the highway, and then stopping at the point where the bread truck struck the deceased (T. 71). On the right door post as indicated in the picture of the bread truck, there was what appeared to be blood stains on the door post itself (T. 74). Officer Peterson placed on the map, Exhibit "A," a red pencil dot to indicate the point of impact (T. 75). At the time the course of the bread truck was indicated by Officer Peterson, the replica of the station wagon was not on the map and Officer Peterson testified after the replica of the station wagon was placed on the map that the red lines indicating the course of the bread truck did not give a true picture, and that the tire marks went to the point of impact. That is as far as we could follow them (T. 76). The station wagon was entirely off the hard surfaced portion of the highway. The left hand side of the station wagon was approximately 3 or 4 feet south of the edge of the hard surfaced portion of the roadway. I would think the point of impact would be a foot or two north of the car and possibly a foot or two off the road surface (T. 78).

Mr. Montell Eccles Mangum, the driver of the defendants' truck, testified that he made a wide turn on 3rd East and 13th South Street, and after he had completed his turn, he was looking straight east (T. 171); that he observed particularly a station wagon automobile parked along the south side of the road fairly close to the sidewalk and facing east, but he did not observe any person in the vicinity of that automobile; that in his best judgment, he was traveling 20 miles per hour (T. 172). As he passed the station wagon, he heard a thud on the side of the truck and didn't have any idea of what had happened, but applied his brakes to stop and investigate, and thought posisbly that some kids had thrown something; he looked at the side of the truck and saw a man lying in the road. Prior to the moment when he heard this thump or bump, he did not see Mr. Kartchner (T. 173), and he was observing down the street at that time; that he traveled 13th South Street between 3rd and 4th East five or six days a week and was well acquainted with that street as well as the hard surface thereon, also the shoulders on the side and where they parked their cars, but had never seen people get out of their cars parked at that place; that he did not always drive as close to parked cars as he did on that day and he did it on that day because of heavy traffic (T. 174). He had a clear, unobstructed view from the corner up to the station wagon and was looking all the time and never did see Mr. Kartchner (T. 175); that he had a conversation with the brothers and Mr. Kartchner's mother (T. 176). In that conversation the driver said he explained to them that he turned to go up the street, and that it happened so fast he didn't know how it happened; that he didn't tell them that

he wasn't looking; that he did not see the door of the station wagon open (T. 177); that he was traveling about 20 miles per hour when he heard the thud; that he had a good view of the truck as shown by plaintiff's Exhibit "B"; he had no idea he had struck a man (T. 179). There was nothing to obstruct his view on his side of the highway; that he was off the edge of the asphalt and on to the loose gravel (T. 181)

The witness Keith Roberg, 10 years of age, testified that Kartchner had just closed the door when he got hit (T. 105; that deceased did not talk to him after he had closed the door (T. 109).

The witness Ross C. Bradshaw was driving west on 13th South and was 60 or 75 feet east of the accident when it occurred. The Dunford bread truck was going toward the parked station wagon and he glanced over and saw Mr. Kartchner, the deceased, standing by the side of his car facing east (T. 91); that the truck hit Mr. Kartchner, rolled him along the front fender, over the hood of the station wagon, rolling him hand over foot (T. 91-92); that the deceased at the time of the accident was not standing much over a foot away from the car, that he did not see the deceased get out of the car—that he first noticed him standing at the side of the station wagon facing east. From the time he saw him until the time he was struck was approximately one second; that he was struck by Mr. Mangum driving the Dunford bread truck; that from his observation Mr. Kartchner,the deceased, was struck from 6 to 9 feet off the main traveled portion of the road; that there were no other automobiles on the highway at the time between

Bradshaw and the station wagon, nor were there any automobiles in front of the Dunford bread truck at the time; the road was clear except for the Dunford bread truck going east and Bradshaw going west (T. 95-96).

The witness Mrs. Ellen Roberg, was present at a conversation on a Tuesday night about 6:30 or 7:30 P.M. after the accident, and the driver of the Dunford bread truck was also present together with other members of the deceased's family. At that time and place, the driver of the Dunford bread truck stated that he was looking down at his book or seat and he didn't know what happened (T. 190-191).

STATEMENT OF POINTS

POINT I

The appellant asserts that the lower court erred in the giving of Instruction No. 7.

POINT II

That the court erred in giving Instruction No. 10.

POINT III

The court erred in submitting to the jury the question of assumption of risk on the part of the deceased for the reason that there was no issue between the parties which gave rise to the application of this doctrine and for the reason that the facts and circumstances shown by the evidence fails to indi-

cate that the deceased could have assumed the risk of getting out of his station wagon on the left hand side.

POINT IV

The court erred in failing to give plaintiff's requested Instruction No. 3, in toto, substantially or in a modified form (T. 26).

ARGUMENT

The evidence in this cause, as detailed in the statement of facts, shows without substanital dispute that on the afternoon of ~~January~~ June 24, 1950, the deceased, Arnold Kartchner, parked a station wagon which he was then driving, on the south side of 13th Street immediately in front of his home and premises at No. 313 East 13th South Street; that his station wagon was parked within a matter of inches from the north edge of the south sidewalk. When he stopped at this point, a young boy, Keith Roberg, came over to his car and talked to the deceased. The deceased then opened the left hand door of the station wagon, got out of the car, shut the door, and was standing at the side of the station wagon facing east when he was struck by the truck of the defendants, driven by their employee, Montell Eccles Mangum.

The testimony shows that the deceased was not more than a foot to the north of the station wagon. 13th South Street is covered with a hard surfaced material commencing at a point approximately 10 feet north of the north edge of the south sidewalk, and that the south edge of the travelled portion of 13th South Street is 18 feet north of the north edge of the south sidewalk. The parked station wagon is approximate-

ly 5 feet in width; the replica of the station wagon attached to Exhibit "A" is not drawn to accurate scale because this replica would indicate the station wagon to be approximately 7½ feet in width, whereas in fact, this width should not exceed 5 feet, according to the testimony (T. 58). The station wagon therefore occupied 5 feet of the space between the north edge of the south sidewalk and the traveled portion of the highway. The south side of the station wagon was within 6 inches to 1 foot from the north edge of the south sidewalk and Mr. Kratchner as he left the station wagon was about 1 foot north of the north side of the station wagon. This left a distance of at least 11 feet between the point where Mr. Kratchner was struck and the south edge of the traveled portion of the highway, and 3 feet from the extreme irregular edge of the hard surfaced portion of the road. These distances can well be calculated from the map, Exhibit "A," and from the testimony of the various witnesses.

When the defendants' truck struck the body of the deceased, it rolled him along the side of his station wagon and over the left fender. The course of the defendants' truck as it moved away from the traveled portion of the highway to the point of impact is not in substantial conflict. It is clear that the truck left the traveled part of the highway and turned in a slow arc until it struck the deceased. It is apparent from the course of the truck that the driver realized where he was a short distance from the point of impact, that he was heading toward the station wagon, because he then attempted to turn back on to the highway. The space between the south edge of the traveled portion of the highway to the north edge of the south sidewalk is 18 feet and this space is not ordinarily

used for motor vehicle travel, and that the area immediately north of the south sidewalk was used for the parking of automobiles.

There can be little doubt but that the operator of the defendants' bread truck was guilty of negligence. Any doubt as to the right of the plaintiff to recover in this action would arise because of the application of the doctrine of contributory negligence. As to the negligence of the driver of the bread truck, it is admitted that his view of the street ahead of him was unobstructed. Mr. Bradshaw testified that there were no cars between his car moving west and the bread truck moving east. Mr. Mangum, the driver of the defendants' truck, admitted that after he made the turn to go east from 3rd East Street on 13th South, that he saw the station wagon of the deceased parked along the south side of the road parked parallel and close to the sidewalk, but that he did not see the deceased; that he was traveling about 20 miles an hour (T. 171-172). Mr. Mangum admitted that he stated a few days following the accident that he had turned to go up the street and that "It happened so fast that I didn't know how it happened" (T. 177). He also stated that he did not see the door of the station wagon open although it is clear that Mr. Kartchner did open the door, did get out of his car, shut the door, and was standing at the north side of the car facing east when he was struck (T. 177). Mr .Mangum on cross-examination (T. 178) was asked:

Q. How could he have gotten out without opening the door?

A. He couldn't.

Q. He must have opened the door and you never saw him open the door, did you?

A. No, sir.

Q. And you never saw him because you weren't looking, were you?

A. It all happened so fast that I couldn't.

Q. Answer my question. You weren't looking, were you?

A. I was looking straight ahead.

Q. And you didn't see him?

A. That's right.

Q. And you didn't see the door open?

A. That's right. (T. 178).

The court in the light of the testimony instructed the jury on the question of the defendant's negligence in Instruction No. 6 (T. 14) that every driver of an automobile shall exercise due care to avoid colliding with any pedestrian upon or near any roadway to do any and all things which may appear necessary to avoid colliding with and injuring a pedestrian, and that a driver is not excused from responsibility when he does not see a person which by the exercise of proper caution

and observation he could have seen, and that if the jury believed from the evidence that the deceased was in plain view of the driver of the defendant's truck, and that the driver either saw or by the exercise of proper caution and observation could have seen the deceased, and that he failed to do so, that such want or care on the part of the driver of the bread truck would constitute negligence. We think this instruction correctly presented the question of the defendants' negligence to the jury and on the basis of such instruction and the undisputed facts, there could be no questoin but what a jury would have been compelled to find the defendants guilty of negligence in causing or contributing to the death of the deceased. In fact it would seem clear from the evidence that the court could well have told the jury that the defendants' driver was guilty of negligence as a matter of law.

POINT I

In the light of the testimony above detailed, the court instructed the jury by Instruction No. 7 (T. 15) as follows:

> "You are instructed that a person cannot deliberately incur an obvious risk of personal injury, particularly when there is a safe course of action open to him, and then hold the author of the danger liable in damages for any injuries sustained.
>
> If you find from the evidence in this case, that the deceased, Arnold Kartchner, placed himself in a position of obvious peril when there was no reasonable justification therefor, then the said Arnold Kartchner is deemed to have assumed the risk of his course of conduct and your verdict must be in favor of the defendants and against the plaintiff, no cause of action."

This instruction was duly excepted to (T. 208).

We contend that this instruction is clearly in error. No reasonable claim could be made that the deceased was negligent in parking his station wagon on the south side of 13th South Street within a matter of inches from the north edge of the south sidewalk. He placed his car in the area used for parking automobiles along the street. If the deceased could be regarded as being in any way negligent, it would arise out out the fact that he got out of his station wagon from the north or left hand side which would be a point closer to the traveled portion of the highway than if he had left his automobile on the right hand side.

Under the wording of this instruction, the jury might well have concluded that the deceased was negligent as a matter of law in getting out of his station wagon on the left hand side. The instruction at least assumes that there was some evidence in the case from which the jury might conclude that the deceased deliberately incurred an obvious risk of personal injury. This thought is further projected into the instruction in the second paragraph where the court states: "If it is found that the deceased placed himself in a position of obvious peril without justification, then the deceased is deemed to have assumed the risk of his course of conduct, and that the jury must then find the issues against the plaintiff."

We submit there is no evidence in the record which shows, or from which any reasonable inference can be drawn, that the

deceased in alighting from his station wagon on the left hand side did in fact place himself in obvious peril, or did thereby deliberately incur an obvious risk. This in turn assumes that the deceased knew, or was charged with knowledge, that there was a danger of moving automobiles and trucks coming over on to the parking area of the street where automobiles are not ordinarily driven. It further assumes that there is some evidence in the record that the deceased knew of the risk to be thus encountered and knew that it endangered his safety. He could not be charged with knowledge that trucks or automobiles would be apt to leave the traveled portion of the highway and without slowing or stopping suddenly turn on to the shoulder and parking area of the road. There is not a word of evidence to show that the deceased either knew the truck was approaching the parking area or that it was coming toward his position in the parking area, nor would the deceased be required to anticipate that the drivers of trucks or other vehicles would fail to keep a proper lookout or fail to keep their respective cars or trucks under control. It is undoubtedly true that it would have been safer for the deceased to have gotten out of the right hand side of his car, but certainly he was under no legal duty to do so, and he cannot be regarded as negligent merely because he alights from his car at least 12 feet away from where automobiles and trucks are ordinarily operated on the highway.

The only testimony in the record which would indicate any negligence on the part of the deceased was the testimony of the driver of the truck that he did see the deceased's car, but did not see the deceased, from which a possible inference

might be drawn that between the time the truck driver saw the station wagon, the deceased suddenly got out of his car in time to be struck. The only other alternative from which negligence on the part of the deceased could be inferred would be the fact that he did get out of the left hand side of his car, and we submit that such conduct on the part of the deceased was not negligence even though it may not have been the safer course. Certainly Instruction No. 7 would be misleading because it would convey to the jury the impression that there was some evidence in the record from which it could be said that the deceased did incur an obvious risk of personal injury, otherwise such an instruction would not have been given. There is no evidence from which any inference can be drawn that the deceased placed himself in a position of obvious peril. "Obvious" means open and apparent, and there is nothing to indicate that when the deceased got out of his car that he knew or had any reason to anticipate that the bread truck was going to leave the traveled portion of the highway and strike him down as he was standing close to his parked automobile, and when the court adds that the deceased must be deemed to have assumed the risk of his course of conduct, it again would give the impression that the deceased placed himself in a position of obvious peril, and that he thereby assumed the risk of his course of conduct by getting out of the left hand side of his automobile. Furthermore, Instruction No. 7 is prejudicial to the plaintiff herein because nowhere in the instruction did the court say that the conduct of the deceased should have been the proximate contributing cause of the accident.

The court instructed the jury in Instruction No. 3 that

contributory negligence means that a person injured has proximately contributed to such injury by his want of ordinary care; but the court by Instruction No. 7 entirely departs from this instruction to bring an entirely new theory into the case other than the duty to exercise ordinary care and, as we view the instruction considered in the light of the evidence, is tantamount to a directed verdict in favor of the defendants. We think at all events the rule of law that would be applicable under the circumstances in this case is simply the exercise of ordinary care in view of all of the facts and circumstances surrounding the deceased at the time of the accident.

The court by Instruction No. 5 placed that duty of ordinary care upon the defendants for the purpose of measuring the conduct of the defendants and no greater duty should have been placed upon the deceased. We submit that the court by defendants' request of Instruction No. 7 was prevailed upon to depart from the rule requiring the exercise of ordinary care and to place upon the deceased a much greater duty and obligation than was justified under any of the testimony or evidence adduced at the trial. In other words, we think that if the facts justify an instruction along the line of Instruction No. 7, then the jury should have been told that it was the duty of the deceased in getting out of his station wagon to exercise ordinary care in observing the conditions of travel along 13th South Street at and near the point of the accident, and that if the jury from the testimony believed that the deceased failed to exercise ordinary care in view of all of the facts and circumstances in alighting from his automobile or failed to observe traffic along said street which was then and there open and obvious, and if the jury believed that such want of ordinary care was the proximate or contributing cause

of the resulting injury and death of the deceased, that then their verdict should be for the defendants and against the plaintiff.

We think the rule of law which should control the question of the deceased's contributory negligence is set forth in the cases hereinafter cited, to the effect that the rule of contributory negligence gives no support to a claim that a driver of an automobile or truck may heedlessly run down those who are where they have a right to be, and particularly so where reasonable men may differ concerning the prudence exercised by the injured person. It was pointed out by this Court in the Case of BARKER vs. SAVAS, 52 Ut. 262, 172 Pac. 672, that if the defendant had looked ahead as was his duty to do, there was nothing to prevent his seeing the deceased; that it was his duty to look ahead in the exercise of reasonable care, and that his duty to so look is generally recognized as to be beyond all controversy.

The defendant Savas was driving his car north on Redwood road at the same time a 6 year old child was riding a tricycle north of the easterly side of Redwood Road. The child was struck by the defendant's car causing fatal injuries. The following is cited from the Savas case (Page 674):

> "But it is contended by appellant that there is no evidence of negligence on his part, or want of due care in driving his machine. The circumstances tend to show that the deceased was riding his tricycle on the east side of the road, near the very edge of the traveled thoroughfare, where he should have been in the exercise of reasonable care. Huddy on Automobiles (3d Ed.) Sec. 120."

"All of the remainder of the road lying west of where the deceased was riding was open to the defendant. He was behind the deceased, with nothing to obscure or obstruct his vision. If he had looked ahead, as was his duty to do, there was nothing to prevent his seeing the deceased in time to avoid the collision. That it was his duty to look ahead in the exercise of reasonable care, in cases of this kind, is so generally recognized as a legal duty as to be beyond all controversy. Indeed the doctrine is elementary."

"In this case the deceased was riding his tricycle on the highway, as he had the right to do. He was riding north, and the circumstances indicate he was on the extreme east side of the road, as was his duty in the exercise of reasonable care. Defendant's automobile approached from the rear. His vision was unobstructed; he could have seen deceased if he had looked, and the law imposed upon him that duty."

"As regards the question of the deceased's negligence, the evidence tends to show affirmatively that he was not negligent. Besides this, if it be said that a child of his age can be guilty of contributory negligence, in this case there being no evidence to the contrary, the law presumes he was in the exercise of due care, and the burden was on the defendant to rebut this presumption. LEWIS V. RAILROAD CO., 40 Utah, 483, and cases cited at pages 494 and 495, 123 Pac. 97."

See also the case of REAGAN v. LOS ANGELES ICE & COLD STORAGE CO., (Cal), reported in 189 Pac. 474.

The facts in this case are as follows:

A Buick touring car of the plaintiff was parked close to the curb and headed in an easterly direction on the street.

The plaintiff and another man were standing on the left hand side of the car. The street at that point was from 60 to 70 feet wide. The day was clear. At the moment of the accident, the plaintiff was standing close to and back of the left rear mud guard of his car. Plaintiff was struck by defendant's on-coming machine and killed.

Quoting from Page 475 of the Decision:

> "The rules of law applicable to such cases are well established. The negligence of a plaintiff which directly contributes to his injury bars recovery. One using a public street is charged with the duty of observing approaching vehicles, it is true, but this rule is qualified and explained by the more general rule that, except in cases where the law itself fixes a standard of care, negligence is always relative and to be determined in view of all the circumstances of the particular case. Thus, if there was a plainly visible obstruction in a street, a person taking position on or immediately in front of it would be in a position of safety and might be relieved from the duty of observing traffic as he would be if he remained on the sidewalk. The standing automobile was a clearly visible obstruction in the course of the on-coming truck. Whether its driver simply continued in a straight course along the curving street, or, as some of the witnesses testified swerved towards the obstruction, is of no importance. He heedlessly drove the truck upon the plaintiff. The plaintiff was in a position where, if it could not be said, as a matter of law, he had a right to assume he would not be run down, reasonable prudent men might have drawn that conclusion of fact. It certainly cannot be said as a matter of law that he was guilty of negligence. The rule of contributory negligence gives no support to the claim that the driver of an automobile or truck may heedlessly or

wantonly run down those who are where they have a right to be, particularly if reasonable when may differ concerning the prudence exercised by the injured person."

STEPHENSON v. PARTON et al. (Wash), ~~156~~ 155 Pac. 147:

The facts in this case are as follows:

The plaintiff had parked on the left hand side of the road with his wagon, used by him as a mail carrier. While standing on the right side of his wagon and in plain view of the defendant's on-coming vehicle, he was struck and killed. It was a bright clear day, the road was level and smooth, the road was 17 feet wide and no traffic. We quote from the opinion, Page 149, as follows:

"In Lewis v. Seattle Taxicab Co., 72 Wash. 320, 130 Pac. 341, we said:

'The footman may rely on the presumption that, so long as he occupies one place or pursues a given course, he need not be run into, and to fail to keep a lookout for the approach of such vehicles is not necessarily want of care. The degree of care required of such a person of course varies with the circumstances. It depends largely upon place and upon the condition of the street; whether the street is crowded with traffic or comparatively free therefrom; whether he enters the street at a place usually used by travelers on foot, and perhaps on many other conditions; but the degree of care required is ordinary care under the circumstances; and this, as we say, may be vastly different from ordinary care with reference to crossing fixed tracks upon which railway or street cars are operated.' "

"It follows that if the deceased was standing in the

road attending to his business, it was clearly the duty of Miss Parton to avoid him in passing with her automobile, especially where there was ample room for so doing."

GOOSCHIN v. LADD 33 P.(2d), (Wash.), 653:

The accident happened January 18, 1932, at about 12:45 A.M. near the city of Seattle. The plaintiff had attempted to back his automobile off the pavement and became stuck in the mud and was unable to move it therefrom. The evidence is in dispute whether his car was 2, 3, or 4 feet off the pavement. While he was standing by his left front fender, he was struck by an on-coming vehicle. We quote from the opinion, Page 655:

"It is first contended that the respondent was guilty of contributory negligence as a matter of law. The evidence upon the question as to whether the left front of the Hudson was off or on the pavement is in dispute. The respondent says that the left front of the Hudson was ' * * * about two or two and a half feet from the pavement. I am quite certain of that. I was standing in that parking, between the pavement and my front, left front. I was clear off the highway. My lights were working that night. They were on all the time. They were on at the time that I last remember. I did not at any time see this car that struck me. I never saw it. I did not see it before I got out of the car. I looked around and I couldn't see anything. I didn't see anything approaching then.' "

"Other witnesses testified that the left front of the respondent's car extended out onto the pavement about 4 feet. If the respondent's car was entirely clear of the pavement and he was standing in the space between

the edge of the pavement and the car, we see nothing upon which to base the charge of contributory negligence."

FABRICIUS v. VIEIRA et al. (Cal.) 233 P. 397:

The facts in the case are as follows:

On a Sunday afternoon about 3:00 o'clock, the plaintiff had occasion to drive his car off the paved part of the highway to the right and stop same because of motor trouble. Evidence shows he was parked from 18 inches to 4 feet off the edge of the pavement. Defendant's testimony showed he was from 2½ to 3 feet from the edge of the pavement. Plaintiff was standing in a stooped position on the left side of his automobile adjusting the carburetor when the defendant's oncoming truck struck the plaintiff and caused the injuries of which complaint is made. The pavement was 18 feet wide at the scene of the accident, and plaintiff could have parked his automobile at a greater distance from pavement. He made no effort to observe approaching vehicles while adjusting the carburetor.

We quote as follows from Page 397:

"There is no doubt as to the sufficiency of the evidence to show that the driver of the truck was guilty of actionable negligence which was the proximate cause of the injury. It is equally clear that the evidence does not show, as a matter of law, that the plaintiff was guilty of contributory negligence. These conclusions so clearly appear from a mere statement of the evidence that further discussion is deemed unnecessary,"

In the case of DEITCHLER v. BALL (Wash.) 170 Pac. 123, the plaintiff was struck by the defendants' truck while he was standing by his car putting up the top and fastening the straps over the front to hold the top down. It was claimed that the plaintiff under such circumstances was guilty of contributory negligence, but the court said:

> "It was not necessary for him to pay particular attention to passers-by who had plenty of room to avoid him. The respondent, no doubt, as contended by the appellant, was required to use ordinary, reasonable care for his safety, and if his testimony is to be believed at all, he did so when he was standing close to his car attending to his business, and was not putting himself in the way of danger."

A rather recent case, HADLEY v. SIMPSON, 115 Pac. 2 (d) 675, held that travelers on the highways are justified in assuming that other drivers will observe the rules of the road and may act upon that assumption without being guilty of contributory negligence. Citing: Richmond v. Tacoma Railway &Power Co., 67 Wash. 44, 122 P. 351; Stubbs v. Molberget, 108 Wash. 89, 182 P. 936, 6 A.L.R. 318.

In the case of SHANNON v. THOMAS (Cal) 134 Pac 2(d) 522, the plaintiff was struck by the defendant's automobile while pushing his automobile down the highway. The court said:

> "Furthermore, it must be said that reasonable minds could at least well differ as to whether appellants were justified in assuming they could make the turn with reasonable safety, and it must not be forgotten that appellants had a right to assume that respondent would observe them making the turn on the highway, and

therefore slacken his speed or make a turn to the right or left of appellant's vehicle thereby avoiding a collision. Kennedy v. Berg, 18 Cal. App. 2d 53, 62 P.2d 1374; Flury v. Beeskau, 139 Cal. App. 398, 33 P. 2d 1033."

In the case of HAYES v. AXELRED, 332 Pa. 518 3A 2d 346 (1939), the plaintiff was a milkman, and was alighting on the left side from his wagon, and ~~down~~ was down on the lowest step when he was struck by the defendant. He was parked close to the curb of the street, and there was ample width for two vehicles to pass without crowding each other. The accident happened on a clear day.

"In affirming the judgment, the court said: "It is obvious that plaintiff made out a case of negligence against defendant. It was in evidence that the accident happened on a 'clear day.' In order to hit the plaintiff defendant's car must have been running closer to the milk wagon than is consistent with due care. Plaintiff's wagon . . . was parked close to the curb on a street of ample width for two vehicles to pass without 'crowding' each other . . . As defendant's truck was in rapid motion, it was the duty of the driver to look where he was going . . . At the argument (defendant) stressed plaintiff's alleged contributory negligence. Under the facts of this case it cannot be declared as a matter of law that the plaintiff did not disclose a case free from contributory negligence. Plaintiff had a right to assume that while he was on the step of his milk wagon, attending to his accustomed business, he would not be struck by any vehicle that was under proper control. He had not placed himself in a position of manifest danger." "

POINT II

Appellant further asserts that the court erred in instructing the jury by Instruction No. 10 as follows (T. 18 duly excepted to T. 208):

> "You are instructed that every person is bound to the exercise of vigilance with the view to discovery of perils by which he may be menaced and their avoidance after they are ascertained. Every person is bound to use due diligence to save his person from injury by the negligent act of another.
>
> If you find from the evidence in this case that the deceased, Arnold Kartchner, failed to exercise vigilance to discover the approach of traffic and particularly to discover the truck being then and there operated by Montel Mangum and that such failure to exercise vigilance was a proximate cause of the fatal injury sustained by the said Arnold Kartchner, then your verdict must be in favor of the defendants and against the plaintiff, no cause of action."

By the foregoing instruction the court placed on the deceased a duty of vigilance thereby departing from the rule of ordinary care. There is no evidence in the record that the deceased failed to exercise ordinary care when he parked his automobile at the curb and left the same from the left hand or north door. The defendants' truck after turning east on 13th South traveled only a distance of 167 feet until it struck the deceased's body. At a speed of 20 miles per hour this would require only a matter of seconds. It is quite apparent that when the deceased parked his automobile, the bread truck would not have been in view.

The witness Keith Roberg on cross-examination was asked:

Q. "Keith, was Uncle Arnold talking to you when he got out of the car?"

A. "No. Not after he closed the door." (T. 109).

This would infer that they did have some conversation after deceased got out of the car and before he closed the door so that when the deceased got out of the station wagon and probably had a conversation with Keith and then closed the door this would have taken up at least 7 to 10 seconds and the driver of the truck testified to traveling 20 miles per hour or 30 feet per second. This would manifestly show and prove that the defendants' truck was not in view of the deceased at the time he got out of his station wagon. Further, it proves that the deceased was in clear view of the defendants' truck driver during all of the time that he was traveling east on 13th South and consequently had ample time to have avoided striking and killing the deceased, had he been looking as was his legal duty to do so. It is also clear that when he opened the door of his car to alight therefrom, the bread truck would not have been in such a position on the roadway as to indicate danger to the deceased. In this position, the deceased had a right to assume that any cars traveling east on 13th South would not leave the ordinary traveled portion of the highway as did the bread truck, and run over into the parking area.

If a duty of vigilance rested upon the deceased, it would be difficult to point out in what way the deceased failed to exercise vigilance or ordinary care under the circumstances surrounding the accident. We can see no facts which would cast

upon the deceased the duty to exercise vigilance under the circumstances disclosed by the evidence for the purpose of discovering a motor vehicle which at the time of the accident was being operated entirely off the portion of the highway normally used by motor vehicles. There is no evidence in the record that the deceased knew, or in the exercise of reasonable care could have anticipated that the bread truck would suddenly leave the traveled portion of the highway and proceed directly toward the deceased. To say to the jury as the court did in Instruction No. 10 that if they believed from the evidence that the deceased failed to exercise vigilance to discover the approach of the bread truck simply invites the attention of the jury to a situation concerning which there is no evidence upon which the jury could possibly make such a finding. To say that every person is bound to exercise vigilance with the view to discovery of perils is not a correct application of a legal principle unless some facts or circumstances are shown which require vigilance in the exercise of reasonable care.

The cases which we have cited under Point I are all applicable to Instruction No. 10 and reference to all of said cases is hereby made in support of the appellant's claim that Instruction No. 10 was erroneous and prejudicial to the rights of the appellant.

We think the holdings of the court in the Deitchler and Hadley cases cited herein are peculiarly applicable to the situation of the deceased in the case at bar. It was not necessary for him to pay particular attention to passers-by who had plenty of room to avoid him. The deceased did not place himself in the way of any danger that was open or obvious and he had the right to assume that motorists upon the highway would exercise reasonable care and would not depart

from the traveled portion of the highway and run into the deceased while he was in a comparative place of safety, also that deceased was required to use ordinary care, and he did so, when he stood close to his car attending to his own business, and such were the facts in the instant case.

POINT NO. III

The defendants' answer (T. 5) sets up four defenses: First, that the complaint fails to state a cause of action; second, an admission and denial of portions of the plaintiff's complaint; third, that the death of the deceased was solely and proximately caused by his own negligence; and fourth, that the deceased was himself guilty of contributory negligence which was a substantial, proximate cause of his death. No defense is set forth in the defendants' answer that the deceased assumed the risk of the danger to which he was subjected by the operation of the defendants' truck.

Notwithstanding the failure to allege the defense of the assumption of risk, the court in Instruction No. 7 told the jury that if the deceased placed himself in a position of peril when there was no reasonable justification therefor, that then the deceased assumed the risk of his course of conduct. We submit that this was not an issue properly to be submitted to the jury for want of a proper pleading. Furthermore, as we have heretofore attempted to set forth, there was no fact or circumstances in evidence from which any inference could be drawn that the deceased voluntarily placed himself in a position of danger or obvious peril. We further submit that the evidence fails to disclose any conduct on the part of the deceased from which the inference could be drawn that

he was guilty of any negligence proximately contributing to the accident.

The courts generally have recognized that there is a clear dictinction between the defense of assumption of risk and the defense of contributory negligence, notwithstanding that they may arise under the same set of facts and may sometimes overlap. The defense of assumption of risk ordinarily involves a choice made more or less deliberately without reference to the fact of the exercise of due care. The principal element of the defense of assumption of risk is knowledge and appreciation of danger. The doctrine under the authorities does not apply unless the particular condition of danger or peril has continued long enough so that the person alleged to have assumed the risk can be said to have known or to have been charged with knowledge of the danger. The application of the defense of assumption of risk more frequently arises out of the relationship of master and servant. In other actions, the defense is usually confined to cases where the plaintiff not only knew and appreciated the danger, but voluntarily put himself in the way of it. (See 38 Am. Jur., Title "Negigence," Sections 171-173).

As will be noted from the defendant's answer (T. 5), the doctrine of assumption of risk was never pleaded as a defense and there is not one iota of evidence introduced in this action to substantiate or support the doctrine of assumption of risk. Therefore, the court in giving Instruction No. 7 particularly and also Instruction No. 10 erred on these grounds and we quote from the case of HILLYARD v. BAIR, 47 Ut. 561, 155 Pac. 449, at Page 450:

"It is a well recognized rule of law that the instructions to the jury should conform to the issues presented by the pleadings and those raised by the evidence. We think the instruction complained of clearly offends against this rule."

See also the following case, DAVIS v. MIDVALE CITY, 56 Ut. 1, 189 Pac. 74, and particularly Page 78 and we quote from therein as follows:

"Instructions should be confined to the issues presented by the pleadings and the evidence. It is improper to give an instruction announcing a naked legal proposition, however correct it may be, unless it bears upon and is connected with the issues involved; and unless, further, there has been received some competent evidence to which the jury may apply it. Such an instruction tends to distract the minds of the jury from the real question submitted to them for determination, and thereby mislead them, and, if requested, may be properly refused." 38 Cyc. 1612, 1613.

"In determining the scope of its instructions, the court must keep in mind the issues made by the pleadings in the cause; and the general rule is that all instructions must be confined to those issues, and the evidence in support thereof, and that no instruction should be given which tenders an issue that is not supported by the pleadings or which deviates therefrom in any material respect." 14 R.C.L. 784, 785.

"Instructions to a jury must be based upon, and be applicable to, the pleadings and evidence. Instructions should be neither broader nor narrower than the pleadings, they should be predicated on all the issues raised by the pleadings and supported by the evidence, and

they are equally faulty whether they enlarge or restrict the issues."

Also many cases are cited to substantiate this position.

It is our position in the instant case that the court erred in giving Instruction No. 7 particularly on the assumption of risk doctrine, when it was never plead and no evidence introduced thereon, thereby making it highly prejudicial to the rights of the plaintiff in this action.

In construing the evidence we must have in mind that generally speaking every person has the right to assume that another will obey the law and perform his duty. The presumption is that duties fixed by law will be discharged accordingly and everyone to whom a duty of care is owing has a right to assume that it will be performed in compliance with the law under which it arises. The failure of a plaintiff to anticipate the negligence of another does not constitute negligence on his part. (See 38 Am. Jur., Title: "Negligence," Section 192).

POINT NO. 4

With respect to Point 4, we wish to call the court's attention to plaintiff's Request No. 3 which was refused by the Court and is worded as follows:

"If you believe from the evidence that the deceased, Arnold G. Kartchner, was standing at the left front door of his automobile or was in the act of leaving or had just left his car by the said left front door at the time of the accident, and that said car was parked

on or near the sidewalk running in an easterly and westerly direction on the south side of 13th South, then the court instructs you that the said Arnold G. Kartchner was in a place where he had a legal right to be, and if you believe from the evidence that he was struck by defendants' truck at said time and place and thereby was injured and died as a result of the injury, then the court instructs you that the plaintiff in this case would have a right to recover for the death of said Arnold G. Kartchner in such an amount as you shall find under all of the circumstances as may be just."

It is our contention that the court erred in failing to give this request in toto, substantially, or in a modified form as we think that this is the law that is applicable to the facts in the instant case, particularly that the said Arnold G. Kartchner, the deceased was in a place where he had a legal right to be, and that the defendants' driver was definitely negligent in leaving the main traveled highway and striking the deceased while he was standing very near his station wagon. This contention is supported by the cases heretofore cited in this brief.

We respectfully submit that in view of the established physical facts considered in the light of a fair interpretation of the evidence that Instructions No. 7 and 10 failed to correctly state the law; that the court misapplied the application of the doctrine of assumption of risk; that the court erred in not giving plaintiff's request No. 3, all of which were prejudicial to the rights of the plaintiff and the heirs-at-law of said deceased; that the judgment of no cause of action should be vacated and set aside and a new trial ordered.

Respectfully submitted,

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