

1952

Ronald Ralph Olsen v. Sheldon T. Warwood et al : Brief of Defendants and Respondents

Utah Supreme Court

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IN THE SUPREME COURT

of the

STATE OF UTAH

RONALD RALPH OLSEN by his
Guardian Ad Litem, Ralph E. Olsen,

Plaintiff and Appellant,

— vs. —

SHELDON T. WARWOOD, BOARD
OF EDUCATION OF THE AL-
PINE SCHOOL DISTRICT, a
Body Corporate; CLIFTON R.
CLARK, CLARENCE D. ASH-
TON, VICTOR C. ANDERSON,
THOMAS POWERS, and
THOMAS A. BARRATT, Members
of the Board of Education of the
Alpine School District, a Body Cor-
porate,

Case No. 7789

Defendants and Respondents.

BRIEF OF DEFENDANTS AND RESPONDENTS

FILED

STEWART, CANNON & HANSON
By REX J. HANSON
DON J. HANSON

-----*Attorneys for Defendants*
Clerk, Supreme Court, Utah

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BRIEF OF DEFENDANTS AND RESPONDENTS

STATEMENT OF CASE

The different versions of the evidence in this case may best be outlined in that part of the brief dealing with the arguments to which they apply. Therefore, the defendants and respondents will not at this time review the evidence except to state that the jurys' finding in favor of

the defendants in this case requires that conflicts in the evidence be resolved in defendants' favor and the evidence be considered in the light most favorable to the defendants.

The appellant seeks a reversal of this case upon four grounds, all of which go to the giving or refusal of the court to give certain instruction. It is the purpose of this brief to demonstrate the correctness of the court's action, the converse of appellant's position, and in doing so we will accept the breakdown of the appellant's brief and deal with the argument as follows:

POINT ONE

THE TRIAL COURT PROPERLY REFUSED PLAINTIFF'S REQUESTED INSTRUCTION NUMBER ONE AND CORRECTLY INSTRUCTED THE JURY ON DEFENDANT'S DUTY TO THE PLAINTIFF.

POINT TWO

THE TRIAL COURT DID NOT ERR IN GIVING INSTRUCTION NUMBER 7 (TRANSCRIPT 223) TO THE EFFECT THAT THE REQUIRED NUMBER OF JURORS MUST AGREE UPON THE SAME NEGLIGENT ACT OR ACTS OR OMISSIONS IN ORDER TO RETURN A VERDICT IN PLAINTIFF'S FAVOR.

POINT THREE

THE EVIDENCE WARRANTED THE COURT'S GIVING INSTRUCTION NUMBER 9 (TRANSCRIPT 224) TO THE EFFECT THAT IF THE JURY SHOULD FIND THAT PLAINTIFF RAN TOWARD THE BUS AT A TIME AND IN A PLACE WHERE DEFENDANT COULD NOT SEE HIM THEY SHOULD RETURN A VERDICT IN FAVOR OF DEFENDANT IF THEY FURTHER FOUND PLAINTIFF DID NOT EXPECT SUCH ACTION AND ACTED AS A REASONABLE AND PRUDENT PERSON UNDER THE EXISTING CIRCUMSTANCES.

POINT FOUR

INSTRUCTION NUMBER 11 (TRANSCRIPT 226) IS NEITHER ARGUMENTATIVE NOR DOES IT COMMENT UPON THE WEIGHT WHICH THE JURY SHOULD GIVE TO THE EVIDENCE.

ARGUMENT

POINT ONE

THE TRIAL COURT PROPERLY REFUSED PLAINTIFF'S REQUESTED INSTRUCTION NO. 1 AND CORRECTLY INSTRUCTED THE JURY ON DEFENDANTS' DUTY.

In Point One of the argument plaintiff cites as error the refusal of the trial court to give his requested instructions to the effect that it was the duty of the defendant to exercise a high degree of care to enable the plaintiff to alight and get from the bus in safety and that the degree of care required is such as a very prudent, careful and competent person would exercise under similar circumstances.

The argument then goes on to cite a number of authorities all of which admittedly define the standard of care required of a common carrier and concludes with the argument that, irrespective of whether or not a school bus is a common carrier, the operator of a school bus should exercise a high degree of care for its passengers. The fallacy of the argument is three-fold; first, the defendant, school district, and the operator of the bus was not a common carrier; second, the court in its instructions to the jury properly instructed the jury upon the higher duty which would be owed to children of a tender age; and third, plaintiff's requested instruction added nothing to those given by the court.

A. The Driver of a School Bus is not a Common Carrier.

A public or common carrier is defined: "A public or common carrier of passengers is one which, as a regular business, undertakes for hire to carry all persons, within certain limitations, who may apply for passage, and holds itself out as engaged in such business." 13 CJS Section 530 page 1034.

"A 'Common Motor Carrier of Passengers' means any person who holds himself out to the public as willing to undertake for hire to transport by motor vehicle from place to place, persons who may choose to employ him." 76-5-13, Utah Code Annotated as amended.

As contradistinguished from this, "A private carrier of passengers is one who, without being engaged in such business as a public employment, undertakes to deliver passengers for hire or reward or even gratuitously." 13 CJS Section 531, Page 1036.

By statute "Contract Motor Carrier of Passengers means any person engaged in the transportation by motor vehicle of persons for hire, and not included in the term, motor carrier of passengers as hereinbefore defined." 76-5-13, Utah Code Annotated, as amended.

The distinguishing feature between the two callings is not that passengers are carried for hire, since this is true in either case, but that a common carrier is engaged in and holds itself out as engaged in the business of carrying passengers to any person or part of the public who may choose to employ it whereas this element is missing in the case of a private carrier.

In *State v. Nelson*, 65 Utah 457, a person who operated an automobile omnibus pursuant to contract with a camping association, in which he transported exclusively guests or prospective guests of the association, and their baggage, for an agreed daily wage, was held not to be a common or public carrier.

In this case defendant did not hold himself out as engaged in the business of a common carrier of passengers but rather transported students to and from school by reason of a private contract for a definite wage between him and the school district to carry only a very limited and predetermined group, that is, school students. (Tr. 127-128) There is no authority cited in which the operator of a school bus has been defined as and held to the standard of care required of a common carrier. On the other hand, there are a number of cases which have held the operator of a school bus is a private carrier and that ordinary prudence for the safety of children under similar circumstances is all that is required.

In the case of *Shannon et al v. Central-Gaitor Union School District et al*, a California case, 23 P2d 769, cited in appellant's brief, an action against a school district for injuries to a child of ten and one-half years who was injured while leaving a school bus and crossing a road, the court said:

"We are of the opinion that a bus which is operated only for the convenience of a particular school under the circumstances of this case is a mere private carrier as distinguished from a common carrier, and that the ordinary prudence for the safety of children under similar circumstances

is all that is required of the district or the driver of the bus.”

This case was followed in *Foster v. Einer* (Calif.) 158 P2d 978.

In the case of *Gaudette v. McGlauklin* (New Hampshire) 189 Atlantic 872, 88 NH 368, an action against the driver of a bus for the death of a school child which was struck by an automobile after alighting from a bus and while crossing the highway the court said:

“The plaintiff’s exception to the failure of the court to charge that ‘a carrier of passengers is bound to exercise the highest degree of care and diligence,’ is without merit. Even a common carrier is not held to such a high standard and the defendant here was only a private carrier. As such, ordinary care under all the circumstances was all that was required of him.”

In the case of *Archuleta v. Jacobs*, 94 P2d 706 a New Mexico case, an action was brought for the wrongful death of a child who was struck by an automobile after alighting from a school bus. The trial court had instructed the jury as follows: “And in connection with these definitions you are instructed that the driver of a school bus transporting children of tender age owes to them the greatest degree of care for their safety, and such course of conduct should extend from the time the children board such bus, and during their transportation to their destination, and including the alighting therefrom by such children under circumstances to insure their safety and leaving the immediate scene of the bus stop. . . .” The appellate court held:

“We cannot escape the conclusion that this instruction of the court cast upon defendant an undue burden, and that this constitutes reversible error. It cannot be said that the law may apply to the conduct of the plaintiff’s deceased the rule of ‘ordinary care’ only, and then say, as was said in substance, in these instructions, that as to defendant, his conduct must be such that everything ‘possible to be done’ must be done by him to avoid injury to the deceased, if he is to escape liability.”

B. The Court Correctly Instructed the Jury on the Duty Owed to Children.

There is no question that the operator of a school bus owes a greater or higher duty of care to children of a tender age than would he owe to adults under similar circumstances. The standard of care of a reasonable and prudent person is a variable factor depending upon the circumstances of each case. As is said in *Archuleta v. Jacobs*, cited above:

“Of course we know that the amount or degree of diligence and caution which is necessary to constitute due, reasonable or ordinary care changes with changing conditions, and we find wide variations according as circumstances in some instances require greater vigilance and caution than in others (Citations) and yet the law has found the foregoing and universally approved definitions sufficiently flexible and reliable for use as a guide in all such cases.”

“It is also true, of course, that the age of a child and its ability to look out for itself and capacity to appreciate danger are always a proper matter for consideration for determining whether proper care has been exercised as to such child.

Conduct that might easily qualify as ordinarily and prudent care as to a child of one age, and with capacity to understand and appreciate danger, might easily fall short of such classification with reference to a child of more tender years and of less understanding and appreciation of danger. (Citations given) And yet, we still measure the care required by the one standard, viz., 'What would a reasonably prudent man do under like circumstances?' "

As was said in *Cartright v. Graves*, 184 SW 2nd 373, in which a child was not quite six years of age:

"That the age of a child and his consequent ability or lack of ability to look after her own safety after alighting from the bus is, as declared as a court of appeals, 'the dominant factor.' "

The court quoting from *Townsley v. Yellow Cab Company*, 145 Tennessee 91, 237 SW 58, went on to say:

"Years ago in *Wheley v. Whitman*, one Head (610), 38 Tenn. 610, this court expressly approved *Robinson v. Cone*, 22 Vt. 213, 54 Am. Dec. 67, to the effect that children of tender age are entitled to a degree of care from others proportioned to their ability to foresee and avoid the perils which they may encounter, and holding that—'What would be but ordinary neglect in regard to one whom the defendants supposed a person of full age and capacity, would be gross neglect as to a child, or one known to be incapable of escaping danger.' "

In the present case the court gave three instructions defining the standard which the jury should apply in determining the duty of the defendant in regard to the plaintiff. In Instruction No. 9 (Tr. 225) the jury was in-

structed that the defendant was required to use such care as a reasonable and prudent person would use *under like conditions and circumstances*. In Instruction No. 4 (Tr. 221) negligence was defined as the doing of some act which a reasonable and prudent person *having due regard for the surrounding circumstances* would not do or the failure to do some act which a reasonable and prudent person having a regard for *all the surrounding circumstances would do*. It was further defined as failure to use that degree of care which a reasonable and prudent person in like or similar circumstances would use. In Instruction No. 5 (Tr. 222) the jury was instructed that in determining whether or not the defendant used reasonable care they should take into consideration *the number and ages of his passengers, the type of a vehicle he was operating, the place at which and the position in which he stopped the vehicle, the conditions of the weather, the conditions of the surface of the ground on which plaintiff alighted from the bus, and any and all facts and circumstances shown by the evidence effecting the care which reasonable and prudent person under like conditions would use*.

It is submitted that the jury were properly instructed as to the standard which they should apply in determining the duty of the defendant toward the plaintiff and the elements, including the tender age of the plaintiff, which they should take into consideration in defining that duty.

C. The Instruction Requested by Defendant if not Improper would add nothing to the Instruction given by Court.

The phrase "high degree of care," or "highest degree of care," or any similar expressions, as contended for in counsel's brief, mean nothing more than "the care that an ordinarily prudent person would exercise under all the facts and circumstances."

"The test of care is not whether in degree it should be slight or ordinary or extreme care, but commensurate care, due care under the circumstances."

Cates v. Hall, (N.C.) 88 S.E. 524;

Fitzgerald v. R. R. Co., (N.C.) 54 S.E. 91.

"The law of negligence is not based upon the highest degree of care which a highly prudent person would use, but on the average reasonable care—the degree of care that twelve men selected at random from the vicinage, will say is reasonable under all the circumstances."

Spanknebel v. R.R. Co., 111 N.Y.S. 705, 707.

In Union Traction Co. v. Berry, (Ind.) 121 N. E. 655, the court gives a very clear exposition of the principles with respect to the standard of care in negligence cases. To quote:

"As bearing on the issue of negligence the court gave the following instruction: 'If you find from the evidence in this case that on and about the 23rd day of May, 1914, the defendant was a common carrier of passengers, then I instruct you that it was held to the highest degree of care and diligence for the safety of passengers consistent with the mode of conveyance employed, and that the omission of the defendant to exercise the highest degree of practicable care constituted negligence on its part.'"

“By the first part of this instruction, preceding the conjunction ‘and,’ the court undertakes to define the duty which the law imposes on appellant as a carrier of passengers, and by the latter part the court attempts to direct the jury as to the application of the rule to the case on trial. Objection is made to this instruction on the ground that it invades the province of the jury, the objection being specifically directed to the latter part, but this part is so closely connected in meaning with what precedes it as to require a consideration of the instruction as a whole. By this instruction the court told the jury, in substance, that the law imposed a different and a higher duty on carriers of passengers with reference to the exercise of care than rested on persons or corporations sustaining other relations involving the exercise of care.”

“In the case of *Bedford, S. O. & B. R. Co. v. Rainbolt*, 99 Ind. 551, 9 Am. Neg. Cas. 277, the court said: ‘The rule that there may be degrees of negligence has long ago been discarded in this state, and, when it is said that an occurrence came about through the slight negligence or gross negligence of another, it is, in either case, nothing more than saying that such person was negligent.’”

“Negligence is the neglect or violation of the duty to use care. If there can be no degrees of negligence, it must follow that there can be no degrees of duty. Duty is an absolute term. The law requires nothing more than duty; it will excuse nothing less. The duty to exercise care for the safety of another arises as a matter of law out of some relation existing between the parties, and it is the province of the court to determine whether such a relation is shown as gives rise to such duty. In determining whether the relation shown

gives rise to a duty to use care, the court decides a pure question of law. This question cannot be submitted to a jury. Where a duty to exercise care exists, it is always the same, regardless of the nature of the relation out of which it arises. It cannot be said that the duty to use care which arises out of the court to carrier and passenger differs in kind, character, or degree from the duty which arises out of the relation of master and servant, or out of any other relation which imposes the legal duty to use care.

“In submitting the determination to a jury of a question of negligence, which is a mixed question of law and fact, the court is required to define the duty which the law imposes. This duty is defined by the law as ‘due care,’ ‘ordinary care,’ or ‘reasonable care,’ which terms are regarded by the courts as having the same significance. It is also the duty of the court to state the rule fixing the standard of care which will measure up to the duty imposed by law. The court should then leave it to the jury to decide whether the acts and conduct of the defendant in respect to the matter before the court measures up to the standards of care fixed by the law. In defining the duty and fixing the standard of care by which the jury is to measure the conduct of the defendant, the court does not consider the facts of the particular case. The duty is the same under all relations, and the standard of care which will measure up to the duty in all cases is such care as a person of reasonable or ordinary prudence would exercise in view of all the conditions and circumstances as disclosed by the evidence in the particular case. It is for the jury to consider the conditions and circumstances disclosed by the evidence, in determining what action should have been taken or

avoided, what precautions should have been employed, and what course of conduct should have been pursued in order to measure up to the duty of 'due care' which the law imposes. In determining this fact the jury applies the standard furnished by the court, which is, What would a person of ordinary prudence have regarded as reasonably necessary or proper under the circumstances?"

* * *

"The use of such terms as 'slight care,' 'great care,' 'highest degree of care,' or other like expressions, in instructions, as indicating the quantum of care the law exacts under special conditions and circumstances, is misleading; and when so used they constitute an invasion of the province of the jury, whose function it is to determine what amount of care is required to measure up to the duty imposed by law under the facts of the particular case. The law imposes but one duty in such cases, and that is the duty to use due care; and the law recognizes only one standard by which the quantum of care can be measured, and that is the care which a person of ordinary prudence would exercise under like circumstances."

POINT TWO

THE TRIAL COURT DID NOT ERR IN GIVING INSTRUCTION 7 TO THE EFFECT THAT THE REQUIRED NUMBER OF JURORS MUST AGREE UPON THE SAME NEGLIGENT ACT OR ACTS OR OMISSIONS TO ACT IN ORDER TO RETURN A VERDICT IN PLAINTIFF'S FAVOR.

In Point Two of the argument the appellant objects to the court's instruction No. 7 (Tr. 224) wherein the court instructed the jury that the required number of jurors must agree upon the same negligent act or acts or upon the same failure to act but that it is not necessary

that plaintiff prove that the defendant was negligent in each and all of the respects charged in plaintiff's answers to defendant's interrogatories and that it is sufficient if the defendant was negligent in any one or more of such particulars. Appellant asserts that if three of the jury concurred that the defendant was negligent because he did not give the plaintiff sufficient time to get off the bus and two concurred that the defendant was negligent because he stopped the bus too near the fence and snow and four others concurred that the defendant was negligent for some other reason, this would entitle the plaintiff to a verdict providing the other ultimate facts were found in plaintiff's favor. The appellant's illustration is unfortunate for the reason that in the example the required number of jurors actually concur on the same act or failure to act, that is, at least six or seven jurors do concur on one common ground of negligence even though four of the six or seven also concur on another ground of negligence. However, we interpret appellant's argument to be that if two jurors concur that defendant was negligent in one respect and three concur that he was negligent in a different respect and four concur that he was negligent in some respect different from the others this would justify the jury in rendering a verdict for the plaintiff.

This argument must fall under a logical examination for the reason that it is based upon the false premise that a concurrence of two or three jurors that the defendant was negligent in some particular constitutes a finding of negligence. Actually, if only two jurors concur that the

defendant was negligent in some respect, such concurrence does not constitute a finding of negligence but actually constitutes a finding that the defendant was not negligent since the remaining six of the eight jurors must be presumed by their failure to concur to have believed that the defendant was not negligent in that respect.

“It is established by a number of cases from several jurisdictions that a failure of the jury to find as to the existence of essential facts or issues the burden of establishing them, on the theory that is equivalent to a finding against the party having he failed to prove them, or that there was no evidence as to them.” 76 ALR 1143.

By the same reasoning the failure of the required number of the jurors to concur that the defendant was negligent in any particular respect constitutes a finding by the jurors that the defendant was not negligent in any respect.

Whenever several acts of negligence are charged any one of which is sufficient as a basis for recovery, it is, of course, necessary for the juror to find only that the defendant was negligent as to one of the acts charged but there can be no finding if at least six jurors do not agree that the defendant was negligent in some one respect. Under the appellant's theory it would be possible for the jury to return a verdict against the defendant if three should find he was negligent in allowing the child to alight in some unsafe place and three others concurred that he was negligent in starting the bus before the child alighted although five jurors should believe that the de-

fendant was not negligent in allowing a child to alight at an unsafe place and five jurors should believe that he was not negligent in starting the bus up before the child had alighted.

In *Trinity and B. V. Railway Co. v. Geary*, 172 South West 545 (Texas) an action was brought to recover for personal injuries. The claimed acts of negligence which caused the injury were set up in separate counts and the court submitted the case to the jury upon three counts of negligence. The statute provided "no verdict shall be rendered in any cause except upon the concurrence of all members of the jury trying the same." The jury found plaintiff, Morris Geary, entitled to recover under his first and third count and assessed his damages at \$2000.-00. The court said:

"Interpreted by the charge, the verdict clearly expresses that a part of the jury found for the plaintiff under the first ground, and a part under the third ground. It is manifest that some of the jury based their finding on the first, and some on the third ground, but all did not agree on either. There being no 'concurrence' of all the members of the jury on either ground of negligence, the action of the District Court in receiving the verdict was in direct disregard of the statute."

In *Baker v. Allen* (Colorado) 189 P4 a verdict finding defendant "guilty of mallice, fraud, or willful deceit in committing the tort complained of," was held bad, being in the disjunctive; it being impossible to say therefrom whether defendant was guilty of fraud or willful deceit or whether some of the jurors found him guilty of one and others of the other offense.

In the case of *Barker v. Missouri Pacific Ry. Co.* (Kansas) 132 P156 an action brought to recover the damages resulting from a fire originating from the defendant's railroad engine, the jury found that the fire did originate from the engine and the defendant requested the court to question the jury as to whether the jury believed the engine was lacking in proper equipment or whether the fire originated from improper operation of the engine. The court refused to submit the questions to the jury and this was held to be error by the court which said:

"The defendant was entitled to a finding by the jury as to whether the engine in question was lacking in proper equipment, or whether the fire originated from improper operation of the engine by those in charge. Many of the questions calling for details touching insufficiency or mismanagement were properly refused. While the statute makes the setting out of a fire caused by the operation of a road prima facie evidence of negligence, still when the jury find that the fire originated from the engine, they should be required, upon request of the defendant, also to find whether it was caused by insufficient equipment or improper management."

"We cannot agree with the contention of plaintiff's counsel that if half of the jurors believed the fire was caused by a defect in the engine and the other half that it was caused by improper operation, the plaintiff would still be entitled to recover. If this were true there might be a consensus of opinion as to the liability of the defendant on twelve different basis on which such opinion could rest, each relied upon by only one of the

jurors and none by all. Their unanimous opinion as to the essential facts of the case, as well as to the general results, must be in favor of the prevailing party. The statutory right to have proper questions submitted having been denied, the defendant did not have the kind of trial it was entitled to."

The cases cited by appellant are not in point for the reason that they do not concern jury verdicts or there is no showing that the jury did not agree on the issues necessary to support a verdict. In the absence of a showing to the contrary, it must be presumed that a jury arriving at a verdict followed the law and the proper procedure in doing so. Therefore, if there are two acts of negligence charged, one which renders the defendant liable and one which does not, the jury will be presumed to have found the defendant negligent in the manner which would render him liable. Also where there are two counts of negligence alleged, in the absence of a showing to the contrary, a sufficient number of jurors to sustain a verdict must be presumed to have found the issues which would support such a verdict, provided there is sufficient evidence to support a verdict upon either or both grounds.

POINT THREE

THE EVIDENCE WARRANTED THE COURT'S GIVING INSTRUCTION NUMBER 9 (Tr. 224) TO THE EFFECT THAT IF THE JURY SHOULD FIND THAT PLAINTIFF RAN TOWARD THE BUS AT A TIME AND PLACE WHERE THE DEFENDANT COULD NOT SEE HIM THEY SHOULD RETURN A VERDICT IN FAVOR OF THE DEFENDANT IF THEY FURTHER FOUND PLAINTIFF DID NOT EXPECT SUCH ACTION AND ACTED AS A REASONABLE AND PRUDENT PERSON UNDER THE CIRCUMSTANCES.

Appellant's argument and the authority cited by

him in regard to this point is that there was no evidence in the trial which would sustain the giving of such an instruction.

This argument overlooks the testimony of Roland Olsen (Tr. 74-75), wherein he testified that he had been guilty of bizzing, or grabbing hold of the back of the bus and sliding along with it, on a previous occasion, nor does it take into account the testimony of Shirley Cluff (Tr. 190) that Ronald Olsen was running toward the bus at the time of the accident in question here. Moreover, the argument does not give the fair import to be testimony of this defendant.

The testimony of the defendant was that the plaintiff did alight on a sound and safe gravel shoulder of the road, not on, but away from the traveled portion of the highway (Tr. 138-139); that it was a perfectly safe place for plaintiff to stand and remain until the bus should move forward in its usual way. Defendant further testified that plaintiff was about five feet from the bus before the driver put the bus in motion (Tr. 154-180). And that apparently plaintiff was injured by coming into contact with the rear wheel of the bus while the bus was in motion. It certainly could not be prejudicial error for the court to use the words "*ran* towards the side of the bus near the right wheel" if he actually "walked," when he could not have been injured unless he did one or the other. In either event his injury was due to an act of his own volition. Whether he ran or walked into the bus is immaterial. If, therefore, the accident could not have happened except by his own act in making such a movement

that he was struck by the bus, the jury had a perfect right to infer or find from the evidence that the plaintiff was injured by "running" into or "walking" into the side of the bus near the right wheel. That is the only possible deduction that can be arrived at from the established fact that the boy was four or five feet away from the bus when it resumed its motion and that he was injured by contacting the bus near the right wheel.

The rule as stated in 64 C. J. page 528 is stated as follows:

"The propriety of an instruction that the jury may draw reasonable and natural inferences from the facts proved to their satisfaction, however, has been recognized, and while there is authority to the contrary, the view has been taken that the court may properly charge that the jury may find any fact proved which they think rightfully and reasonably inferable from the evidence. Further instructions suggesting to the jury inferences which may be drawn from the evidence have been upheld, and the view has been expressed that where there is no dispute as to the immediate fact testified to and the question is as to the effect of such fact, it is not an invasion of the province of the jury for the judge to point out to them the different conclusions which may be drawn and the circumstances which may incline them to believe the one or the other."

The authority cited in the text as contrary to this rule is the case of *Henry v. Colorado Land, etc. Co.*, 51 Pac. 90, but the instruction given in that case and which was found to be objectionable, is altogether different from the instruction here complained of, and the court in effect

recognizes that in a proper case the principle for which we contend may be applied. The following is the court's statement:

"To state generally that whenever evidence is given the jury may infer therefrom any fact which they think reasonable is an inaccurate expression of the rule. *The inference must of necessity flow from the fact* and by a legitimate inference under the principles which govern the introduction of testimony. It is not every inference which the jury may think deducible from the facts which they have a right to take as a basis for their verdict. This would leave the determination of causes too much to conjecture and relieve them from the yokes of the law which they are only too willing to shake off and act on their own notions of what is right and wrong regardless of the proof."

The inference that the boy ran into the bus of necessity flows from proof that he was four or five feet away from the bus after he had alighted and that he could not have been injured unless he had of his own volition run into it.

In 53 Am. Jur. 458 it is said:

"It is not necessary that there be categorical evidence as to a matter covered by an instruction, it being sufficient if there is evidence of facts from which the fact might be inferred."

And in 64 C. J. 783, it is said:

"The rule that an instruction should conform to the evidence does not require that the instruction shall be supported by positive testimony always. It is sufficient if the assumed fact may be

inferred reasonably from the circumstances proved.”

This case is no different in principle from *Bryant v. Bingham Stage Line*, 60 Utah 299, 208 P. 541. To quote:

“There are certain physical facts that are not in dispute: (1) Both the automobile and the street cars were moving at the time of the collision at rates of speed ranging from 8 to 20 miles an hour—the exact rate is immaterial. (3) The fender of the street car struck the right rear wheel of the automobile while it was passing over the north track upon which the street car was moving. From these facts alone the conclusion is irresistible that the automobile was driving upon the track immediately in front of the moving street car. If it had not been driven upon the track immediately in front of the moving street car the collision could not have occurred. Assuming that the automobile was moving only 8 miles an hour, which is the lowest estimate made by any witness, it would be moving a fraction more than 11 feet per second. The automobile, in attempting to cross the track, having been struck before it could get across, must have been driven upon the track immediately in front of the moving street car. We think, in view of the uncontroverted physical facts, the trial court was justified in assuming that the automobile was driven on the track immediately in front of the moving street car.”

The court clearly had a right to state in the instruction that the jury might find that the child contacted the bus near the right wheel at a time and place where the defendant could not see him, and also that they might find that the defendant as a reasonable and prudent per-

son did not expect such action on the part of the plaintiff. If there were no testimony as to whether the driver could or could not see the plaintiff contact the right side of the bus near the rear wheel the court would be warranted in taking judicial notice that the driver of a bus seated on the left front side could not see the part of the bus near the rear right wheel.

POINT FOUR

INSTRUCTION NUMBER 11 (TRANSCRIPT 226) IS NEITHER ARGUMENTATIVE NOR DOES IT COMMENT ON THE WEIGHT THE JURY SHOULD GIVE TO THE EVIDENCE.

The instruction complained of reads :

“In weighing the evidence adduced in this cause pertaining to the defendant’s alleged negligence, it is your duty to consider it as you would under all the facts and circumstances existing at the time of the accident, and not to consider it as you would looking back upon the event from this later date. Quite ordinarily, individual actions in any given set of circumstances may disclose faults and criticisms when looked back upon and tested by cool and deliberate thinking away from the event, which would not be apparent to a reasonable and prudent person at the time he is surrounded by the circumstances of the accident. Thus the question is whether or not the defendant at the time of the accident, and surrounded by all of the circumstances shown by the evidence to have surrounded him at such time, acted in all respects as a reasonable and prudent person would act. If he did so act, he was not negligent, and therefore, he is not responsible for damages resulting from the accident. But if he did not so act in any particular alleged in the pleadings then

he was negligent, and is charged with all damages proximately caused by such negligence.”

It is correct that the judge should not invade the province of the jury and decide questions of fact and the weight which should be given to the evidence. The foregoing instruction does neither. No issues of fact are found in the instruction by inference and the jury are not told what weight should be given to any evidence. They are merely told that in considering the evidence they must “consider it as you would under all the facts and circumstances existing at the time of the accident, and not to consider it as you would looking back upon the event.” This is a correct statement of the manner in which the jury should consider the evidence:

“The test of actionable negligence is what a reasonably prudent person, or a reasonably prudent and careful one, would have done under the circumstances, *before the accident*, it is what a reasonably prudent and careful person would have done under the circumstances in the discharge of his duty to the injured person, or what a reasonably prudent man would have done in the discharge of his duty as they existed at the time of the accident, and not what could or might have been done to have prevented a particular accident.”

In *Milasevich v. Fox, Western Montana Theatre Corporation*, 165 P2d 195, it was held that the test of actionable negligence is not what might have prevented a particular accident, but what reasonably prudent men would have done in discharge of their duties under the circumstances as they existed at time of accident.

In *Maynard v. City of Helena*, 160 P2d 484 (Montana) an instruction that one suddenly put in danger was not required impertively to do that which after peril was ended it was seen might have been done, and that under such circumstances a person would not be required to exercise same judgment that an uninterested bystander might manifest, was proper.

CONCLUSION

It is submitted that the defendant has failed to show any prejudicial error in any of the court's instructions and that no new trial should be awarded.

Respectfully submitted,

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