

1953

Heber W. Glenn v. Gibbons & Reed Company : Brief of Appellant

Utah Supreme Court

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Dan S. Bushnell; Attorney for Appellant;

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IN THE
SUPREME COURT

OF THE
STATE OF UTAH **FILED**
JUL - 1 1953

HEBER W. GLENN,
Plaintiff and Appellant,

— vs. —

GIBBONS & REED COMPANY, a
corporation,
Defendant and Respondent.

Clerk, Supreme Court, Utah

Case No. 7952

BRIEF OF APPELLANT

DAN S. BUSHNELL,
Attorney for Appellant.

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STATEMENT OF CASE

This was an action based on negligence to recover damages resulting from a slide in a gravel pit owned and operated by respondent, Gibbons & Reed Company, which

buried a power shovel owned by the appellant (R. 1, 2). The case was tried before a jury who returned a verdict in favor of the appellant (R. 10) subject to prior motions made by the respondent for a directed verdict of no cause of action taken under advisement by the court (R. 9). The court subsequently granted the motions and set aside the judgment on the verdict directing a judgment of no cause of action in favor of the respondent (R. 13). The motions for a directed verdict and judgment notwithstanding the verdict were based on the grounds that there was no showing of negligence and proximate cause as to the conduct of the respondent, Gibbons & Reed, or that the conduct of the appellant constituted contributory negligence (R. 9, 346, 424).

STATEMENT OF FACTS

Since the issue before the court is the sufficiency of the evidence to go to the jury and will require in the argument a fairly complete review of the evidence, only a brief summary of the facts will be made at this time.

On the 19th day of July, 1951, the respondent, Gibbons & Reed Company commenced removing gravel from property owned by the respondent located east of Beck Street in the hills southeast of Bountiful, Utah (R. 349, 27). The gravel pit generally was called the White Hill Sand and Gravel Company operated under a lease by Gordon T. Hyde (R. 26). However, the respondent, Gibbons & Reed Company, had retained in their lease the right to remove materials for its own operations. The

original order, when operations were commenced by Gibbons & Reed, contemplated a removal of approximately 20,000 yards of gravel (R. 31, 178). Ultimately 73,386 yards were removed (R. 406). The material was removed from the north side of the canyon as contrasted to the operation conducted by Mr. Hyde which was on the south side of the canyon (R. 108). After the original order of approximately 20,000 yards had been completed an additional order was made and the operation continued with successive orders until approximately 50,000 yards had been removed (R. 180). This original 50,000 yards was removed by use of a shovel owned and operated by Gibbons & Reed Company (R. 33). Their shovel had been taken from the project when a request for additional gravel was made and a small amount was then loaded by the equipment of Mr. Hyde (R. 41). On October 8, 1951, to comply with additional requests for gravel, arrangements were made with Victor Newman to load the gravel (R. 406). Newman's shovel was not in operating condition and he leased the shovel owned by the appellant and used it to load the gravel at the pit (R. 290). On October 13, 1951, there was a slide in the gravel pit which buried the shovel of the plaintiff which gives rise to the lawsuit (R. 48). The testimony in support of the appellant's case was submitted to show that the respondent in anticipating that only 20,000 yards of gravel would be removed commenced loading the gravel from the base of the hills operating the shovel on a constant level, (R. 35), digging into the hill which resulted

in the establishment of practically a vertical bank of gravel which was variously described as being from 60 to 100 feet in height (R. 45, 356). On August 16, 1951, in order to enable the respondents to continue loading the gravel, blasting operations were commenced to cause the bank to slough off and make available loose gravel at the floor of the pit which could be loaded by the shovel (R. 406). The floor of the pit was located on a clay base of undetermined depth (R. 47, 122, 185). The loading was purposely kept above the strata of clay since only gravel was desired. There was a considerable amount of water or a dampness encountered in removing the gravel from the top of the clay, it being apparent that the water seeped down through the gravel until it came to the clay strata and then followed along on top of the clay strata (R. 47, 93, 108, 185, 122). It was the contention of the plaintiff that the operation was dangerous in that there was created a precipitous vertical bank of gravelly material which danger was aggravated by the fact that the gravel was on a wet clay base and the respondent continued to blast with dynamite at the base of the vertical bank loosening the material all of which, together with the force of the over-burden, pushed the base out permitting the slide.

POINT I.

THE COURT ERRORED IN DIRECTING A JUDGMENT OF NO CAUSE OF ACTION IN FAVOR OF THE RESPONDENT SINCE THE EVIDENCE OF NEGLIGENCE, PROXIMATE CAUSE AND CONTRIBUTORY NEGLIGENCE WAS

SUFFICIENT TO REQUIRE THE SUBMISSION OF THOSE
ISSUES TO THE JURY FOR ITS DETERMINATION.

A. Respondent's negligence and proximate cause.

The motions of the respondent for a directed verdict were in substance based upon the grounds that the appellant had not introduced evidence showing negligence and proximate cause and for the additional ground that the appellant was contributorily negligent. It is elemental that on appeal from a directed verdict the evidence will be reviewed in the light most favorable to the appellant. It is equally fundamental that the issues of negligence, proximate cause and contributory negligence are questions for the jury when the evidence is such that reasonable minds may differ as to the conclusion to be drawn from the evidence. Viewing the evidence in the light most favorable to the appellant it is submitted that the evidence shows that the respondent was negligent, which negligence was the proximate cause of the damage to the appellant. More particularly, an introductory summary of the factors showing that the respondent operated the gravel pit in a dangerous manner which was known to the respondent or should have been known by the respondent and the factors showing a lack of due care by the respondent are as follows:

1. The gravel pit was operated with a practically vertical bank extending from 60 to 100 feet in height.
2. The gravel material was resting on a wet clay base.
3. Water ran through the gravel down to and along

the clay washing therefrom the fine material holding the coarse gravel formation in tact.

4. The respondent blasted with dynamite vibrating and further loosening the formation of gravel at its base.

5. The operation of the pit was not in compliance with the general safety orders issued by the Industrial Commission of the State of Utah which required that the bank be sloped.

6. The pit was not operated in the normal and usual manner for gravel pits of this type since the bank should have been terraced into a gradual slope of successive levels when removing the material from the bottom rather than from the top of the formation.

7. The respondent owns and operates other gravel pits and is familiar with the normal and usual procedures.

8. The operation in this gravel pit was not done by the respondent's regular gravel pit operator but rather by a foreman whose primary duties were not the supervision of gravel pit operations.

9. The respondent has available safety engineers with whom the gravel pit operator could have consulted in connection with the removal of the gravel and the blasting.

10. The respondent was warned by Mr. Hyde that the operation was dangerous.

11. The operator of the shovel for respondent refused at one time to work in the pit as it was being operated.

12. Men sent to the operation from a commercial

blasting company refused to blast under the circumstances under which the pit was being operated.

13. Witnesses testified that it could be reasonably anticipated, foreseen and expected that the operation of the pit as being conducted by respondent would result in a slide.

A more detailed review of the evidence in support of the appellant's claim not only shows that the evidence was sufficient for submission of the issues to the jury but rather that the evidence is so strong that it more than amply justifies the verdict of the jury in finding the issues in favor of the appellant.

The first witness called by the plaintiff was Gordon T. Hyde, owner and operator of White Hill Sand and Gravel Company, who had been in that profession between 25 and 30 years (R. 26). This witness testified that there were two different ways of operating a pit of this nature (R. 29). One was by use of a dragline consisting of a bucket attached to a cable which was pulled back and forth scaling off the top of the hill. The other procedure would be by using a shovel and starting at the bottom, but instead of staying on a constant level, various levels would be created gradually ascending up the hill in a gradual slope. This procedure is commonly called or referred to as terracing the hill (R. 29). Neither of these procedures was followed by the respondent company; but rather, the company came onto the property and removed the material maintaining their shovel on a constant level (R. 30, 35), except for approximately one-

half day when the shovel was attempted to be operated at a higher level resulting from the refusal of the operator of the respondent company to work any longer under the bank (R. 35,180). This operation at a higher level was discontinued after approximately one-half day since the material secured from that location did not meet the specifications desired by the company (R. 35, 36 and 93). His testimony was also to the effect that what was called a vertical bank in places was as high as 100 feet (R. 46); that the shovel operated on a clay base with water in some places described as running water encountered at the top of the clay base (R. 47), and that a powder man referred to as a Mexican came out and inspected the bank and refused to perform any blasting work in connection therewith (R. 39-40). Thereafter a contract was made to employ some of Mr. Hyde's men after working hours to do the blasting (R. 40, 91). The witness further testified that he refused to load any material for the respondent under the bank or to blast under the bank and thereafter refused to load any of the gravel for the respondent (R. 42). After the respondent company had thought that it was through removing gravel from the pit and had removed its shovel and equipment, a trap was installed in the pit for Mr. Hyde since he contemplated operating in that region. Thereafter when respondent returned for additional gravel Mr. Hyde remonstrated against the respondent removing what he termed was a wedge of material which afforded protection to the trap. In so doing he told

the foreman for the respondent company as follows:

"I talked to Mr. Keith when he ordered his blasters to go in there and blast and asked him not to do it. I told Mr. Keith that I wouldn't go under there if I were those men I wouldn't go under there for the whole Phillips Petroleum Co. and that was the key, and they were making a serious mistake if they removed it." (R. 45).

This witness further testified as follows:

"Q. Okay. Now when you said that this was dangerous what did you mean?

A. I meant that they were operating on a layer of clay with gravel from which the gravel had been washed out and they were operating that where they blasted. One side there the material would drop down fifty feet on the other side and I knew that the bank had been jarred until it was just shaky.

Q. And dangerous to what?

A. What?

Q. Dangerous to what?

A. To anything or anybody operating under there.

Q. To any person operating under it.

A. To anything else near there." (R. 82, 83.)

"Q. Now you said that you considered this a dangerous bank. What caused you to believe that it would be dangerous?

A. Because I have seen it fall down time and again when they blasted; seen it slough out a larger or smaller quantities. It was right on

the clay bank and the water it made a perfect rollercoaster out of it.

Q. By roller-coaster, what do you mean?

A. I mean this. That those round rocks had nothing in between them, no sand in between them, so they would be impacted. There were layers of rock without any fine material in it and if the bank ever started it would come right down. The same thing is true in Parleys Canyon. I could cite you a half a dozen different cases where they had the same thing happen under exactly the same conditions.

Q. You were expecting a slide?

A. That's right." (R. 103.)

"Q. Now you said you had seen similar slides to this. Do you have in mind banks similar to this?

A. Well, we have been operating on one for years.

Q. Where is that?

A. Across the canyon. The same one exactly. It's exactly the same kind of a bank, the same kind of formation. We have a clay. We run into beds of clay when we get down to a certain distance, with gravel on top. It is a wet hill. It's so wet we have streams coming out of it. We have tanks of water that we gather from those streams, and Gibbons & Reed people have filed on for irrigation. Now there is plenty of water in all those hills. They are just exactly the same. We have operated on there for years and taken out hundreds of thousands of yards of material and never had a slide.

Q. How have you done that operation?

A. We have used the dragline and the dozer and

we have taken the material off the top and not off of the bottom.

Q. Does that permit you to leave the bank and the hill in a general gradual slope?

A. A gradual slope from the stream height in the rear to the trap which acts as a barrier for the general slide of the material." (R. 108.)

"Q. In all your experience you have never seen anything like it, have you?

A. Oh yes, yes. I have seen them. Not quite the same, but I have seen it. I have seen it in Parleys Canyon.

Q. So that you would expect it?

A. Yes. Not exactly like that but I have seen the same cause produce the same effect.

Q. To what extent?

A. I don't think as large as that, no.

Q. Anything like that?

A. Well, like it. Yes, on the same lines.

Q. I mean in extent?

A. No, I think not. But it is not, it is not unusual to have something of that kind happen.

Q. It is not unusual to have a slide in a gravel pit, is it?

A. It's not unusual if you take the bottom out. It happens nearly every time.

Q. I say, it is not unusual to have a slide in a gravel pit?

A. Well, we have operated our pit for ten years. We operated another one and I have been doing it for twenty-five years and I have never had a slide." (R. 109 and 110.)

The next witness was Arlo V. Dastrup who testified that he had been working at the White Hill Sand and

Gravel pit as a superintendent since 1938 (R. 115). He was one of the men employed to do the blasting after work for Mr. Hyde was completed. He testified that after the first blast he told the superintendent for the respondent that "it was so doggone dangerous that I renigged on him" and demanded more money (R. 117). As to the procedure for blasting he testified that they would climb up on any loose material at the base of the vertical face of the bank and would dig a hole straight into the face of the bank usually about eight feet and place the dynamite in the hole and set off the blast. Occasionally they set off two blasts simultaneously at different places in the face of the bank (R. 118). Before discharging the blast they would get as far away from the charge as possible, usually 150 feet, at which distance they could feel a definite vibration and shaking of the ground when the powder was discharged (R. 119). They would use anywhere from ten to eighty-five sticks of dynamite at different times. Blasting was not done every night but usually every two or three days or as often as necessary to secure sufficient loose material for the shovel to load. The evening before the slide Mr. Dastrup testified that they had set off a discharge using 32 sticks of dynamite (R. 121). He stated that the bank had become loose from continual blasting which made it difficult for them to dig the hole in which to put the charge of dynamite (R. 122); confirmed the prior testimony as to the water on the clay base (R. 122); and testified that he was glad when they were through since he was darn scared (R. 123). The witness stated

that the height of the bank before the slide was 80 feet and maybe higher (R. 121), and further verified that before the slide they had blasted away a wedge of material and dirt of 30 or 40 feet (R. 127). As to their operation in the gravel pit he stated that they had always pulled the material from the top (R. 133).

C. W. Spence, former State Mine Inspector for 8 years, testified that any gravel bank higher than a boom on a shovel, described as being 30 feet high, was dangerous and that any bank which was straight up and down or nearly vertical was considered to be dangerous. The witness testified that safety rules had been established as a result of a conference of interested persons (R. 153, 155). The safety rules as there developed and adopted by the Industrial Commission in part provided as follows:

“Section 60.

(b) It shall be the duty of the foreman, shift boss or other designated official to see that banks are made safe before men or equipment are allowed to work under them. Men scaling or barring down the banks must be provided with safety belts where necessary.

(b-2) Employees will not be required to work under unsafe banks. If employee or employees deem banks to be unsafe they shall immediately advise their foreman relative to such condition and proceed to prepare or make the banks safe for operation.

(c) All possible precaution shall be used in open pit operations to prevent accidents resulting

from falls of rock from banks. These precautions to include proper sloping of banks consistent with type of rock, height of bank and type of equipment used." (R. 146.) (Exh. "G".)

Concerning the blasting he testified as follows:

"A. Well, I would say if they kept blasting it would be all right, but if they blast and clean up and again blast and clean up you are working under a dangerous spot all the time." (R. 160.)

As to the proper or safe way to operate under such conditions the witness testified that they should work from the top either with a cat or a dragline (R. 165).

Irwin Hansen, an employee of respondent and the shovel operator who loaded the first 50,000 yards before the shovel of the respondent was removed from the pit, was called as a witness. Concerning the dangerous nature of the bank he testified as follows:

"Q. Did you at one time pull your shovel away from the operation?

A. I did.

Q. Why?

A. It was too dangerous to work under it." (R. 180.)

"Q. You state you removed your shovel. Did you see anyone when you did that?

A. My immediate supervisor.

Q. And who was that?

A. Louis Keith.

Q. And what did you tell him?

A. I told him that it was too dangerous." (R. 182.)

This witness also verified that there was water and not just dampness found on top of the clay base at the bottom of the gravel formation (R. 185). He stated that in his opinion the effect of the continual blasting over a period of time would be to loosen or shaken the base of the gravel bank since that was the general idea of blasting (R. 186). The witness further testified concerning the dangerous nature of the operation as follows:

"Q. What did you expect the bank to do, considering it was on a wet clay base with water running through the gravel at the base and after they had been blasting at the base for approximately a month?

A. Say that again.

Q. What would you expect to happen, without reviewing those factors — you know what they are — what would you expect to happen with that vertical bank?

A. I would expect it to come down.

Q. How would you expect it to come down?

A. To slide down; slough down.

Q. How far away did you operate your shovel from the bank?

A. Approximately twenty-five feet.

Q. And you considered that to be dangerous even so, is that right?

A. Yes.

Q. How far back would you have felt that you would have had to be away from the highest point of the vertical bank, or nearly vertical as you have described, in order to be safe from any sliding down would you expect it to happen as the result of those operations?

A. Say that again.

- Q. How far back — you said that you operated back about twenty-five feet and you considered that dangerous — how much further back would you believe that you should be to be completely free and safe from any anticipated slide or sloughing caused by the operation?
- A. You are never safe in a gravel pit." (R. 187 and 188.)

Melvin A. Cook was then called as an expert witness. He testified that he was Professor of Metallurgy and Head of Explosives Research at the University of Utah. He had been professor of metallurgy for about 5½ years and Director of Explosive Research for about one year. The witness testified that he had a bachelor's degree and a master's degree from the University of Utah, a Ph.D. degree from Yale University secured in 1937. His training was in the field of physical chemistry. After his school training he worked with the DuPont Company for the next ten years in their explosive department in the research laboratory. His job was the development of new explosives and studying of blasting problems involving field work connected with quarrying, metal mining, oil well shooting, gas well shooting, and similar operations. In connection therewith he traveled all over the country studying such problems and analyzing the results caused by the use of explosives. He studied the results of blasting operations at North Branford, Connecticut and at Haverstraw, New York on the Hudson River in quarries located at those places and was called to conduct investigation and research in connection with the

Texas City explosions where he spent a year and a half or two years investigating and testifying at the trials in connection therewith (R. 197-200). After a review of the nature of the operation conducted by the defendant and the physical factors there present the witness testified as follows:

"A. Yes. That sort of operation is extremely hazardous.

Q. Why?

A. In the first place one never operates a quarry or a pit of that sort with such a high face. That is, if he does he recognizes that he is dealing with a severe hazard. This is a well recognized thing in all blasting that a high face is hazardous. Well that is one condition that you mentioned there, a hundred foot face. A second thing I see there is one usually tries to select a firm bedding plane when he runs an operation of that sort as you have described it. You had a clay bedding plane. A clay bedding plane, particularly one that was wet is a very slippery one and a very hazardous plane. When one gets a sloughing like that usually it exploits such a plane as that. That is the breakage is across the bedding plane that is soft and easy to break. This, as I understand it from your description, was toward the bottom and one that might normally be the bedding plane of the working of the quarry. So that having such a base as that is a very hazardous condition. The operation to me is very questionable, using the type of shots that were being used there. It is irregular shooting. Very seldom

do you see any such thing as that and I think a dynamite technician would recommend against any such operation as that immediately.

Q. What could be foreseen to happen in this type of operation in using dynamite as I have explained it there? What are the things that might have been foreseen?

A. Well you always anticipate a breakage in the face. Whenever you have a face you anticipate that you will break somewhere in that face. If the face is high then you have a considerable depth over which you may have breakage. You may have a slough off the top and the higher it is the more hazardous that slough off the top might be.

Q. How far back would you anticipate that a break might occur?

A. Well it would be a normal thing to find a break approximately the same width as the height of the face. It is things like that that tend to go towards symmetry and you expect to have a breakage about as wide as the height of the face if you get a breakage. Of course, that depends upon how far down the breakage occurs. If the breakage were to occur high up then it would need to break that far back. The further down in the place your breakage occurs the farther back you expect the breakage to be. If it were to occur at the base then you would expect the width of breakage to be something the order of the height of the face." (R. 203 and 204.)

"A. Well in this particular thing we are talking about here with a high face it is very tricky. Any literature you pick up on blasting with a high face you are always warned that you

are dealing with a very hazardous condition. Now the explosive itself might be used to create a hazard in the process of shooting one row after another. That is one round after another and you are worried every time you load a high face on this problem of breakage or slough off the top. Things of that sort. It is a very hazardous operation and well recognized to be a hazardous operation. Recommendations that you would read in standard blasting handbooks, for example, DuPont's blasting handbook that I had a great deal to do in the preparation, would say that you are dealing with a hazard every time you have a face more than say thirty to fifty feet high. If you have a hundred foot face then everyone recognizes that you are dealing with a severe hazard.

Q. All right, a hazard to what? You say it is a hazard. What are the dangers to be expected or to be guarded against?

A. * * * You have another hazard that involves the equipment operating the quarry. Whenever you are near an operation of this sort you always have the problem of worrying about a break off and a break out of the whole burden itself. A vertical wall or a nearly vertical wall presents a hazard, particularly when your soft and friable materials, gravel and things of that sort, a slough off and a break down of the face is always a hazardous problem. You always must worry about any equipment within the range of a possible slough off and that range can be anywhere from one to three or four times the height of the quarry, depending upon the particular conditions involved.

Q. You say one to three or four times in height? Would you say equipment or men at a distance less than one times the height of the face would be in a safe working position or place?

A. No. One is never in a safe operating condition when he is within the distance of the height of the face. Particularly I mean if it was a shallow face then the hazard is not serious but with a high face safe-minded men are always worried about a problem of that sort." (R. 205 and 207.)

"Q. Would you say in this case the presence of the wet clay and the water on the gravel above would create an additional hazard?

A. Yes, indeed." (R. 208.)

"Q. Now I asked you what could be foreseen from an operation like we have outlined, then I more or less cut you off. The first thing you said this, a cut or a break which could be expected about the same distance back the height of the face. What other things, if any, could be foreseen or expected from that type of an operation?

A. Let me make that clear. I said the distance back from the bank would be comparable to the depth where the break occurs. If the break occurs toward the top you don't expect to have it break back to the face. If it occurs toward the bottom you expect to have it break back that far.

Q. Supposing we have a break about half way up the face of a hundred foot bank. Say the average between eighty and a hundred feet or ninety feet that you have a break. How far would you expect the material would come down, would extend in the base of the pit?

A. Toward the top you would expect it would break back about forty-five feet and in the slough off it would go out certainly more than forty feet. It would go out about one hundred feet and likely even more than that.

Q. And that is because it is high and falling down with force it falls farther? Is that the reason for the additional distance?

A. Yes, that's right." (R. 208 and 209.)

"Q. Well, could there be a very substantial amount of weight that could be caused by this type of thing?

A. Yes. It has a substantial amount of weight. A cubic yard of rock will probably weigh two or three tons and if you have an eighty foot face, ninety feet bank, you have something in the order of two hundred thousand to a million tons of rock in a face like that.

Q. Now what effect would that have on weighing down on this clay base?

A. Well now, that, of course, the weight of that down on a clay bed might give you the same effect as though you pinched a pea in a pod. You might squirt the pea out of the pod and the bottom clay might tend to be squeezed out by downward thrust of the burden. You might tend to produce that. That, I think, is a common thing when you have a clay bed. That could be expected under the circumstances." (R. 210.)

"Q. Well I don't know whether we covered it all or not. Did I understand you correctly in your illustration of shooting a pea out of a shell? What did you mean by that?

A. Well I was thinking —

- Q. If it will help you can come over to the board and show it as you had it in mind.
- A. Supposing we have right down in this region a clay bed and particularly one that is moistened so that it is naturally soapy and slippery. That is one of the characteristics of clay. Then with all of the overburden here which if this is one hundred feet from here to —
- MR. JONES: I can't see you, Dr. Cook. Where did you say was the hundred feet?
- A. If we suppose the distance from here to here is ninety feet and this —
- Q. That would probably be eighty to one hundred.
- A. Eighty to one hundred feet vertical and we have a clay bed down at the bottom that is moistened and soapy of the character of moistened clay, then the downward thrust of this eighty to one hundred feet of gravel considered, for example, back to a distance approximately of the depth of the face that is eighty to one hundred feet back, that burden would weigh something like well, if it is as broad as described, from two hundred and fifty to three hundred feet from one side to the other, we have here something like a million or two million tons of rock and of gravel thrusting down on top of this clay bed. Now the clay bed then would be squeezed and if it is oily and particularly if there is nothing in front of it to hold it and right in here a little shooting anyway to loosen it up in this region and water running through it then the chance of that being squirted out just like one would squirt a pea out of a pod like one pressing his finger on it is very good. That is a very good possibility, so that one should anticipate

the possibility of that burden producing a break of that sort. That is producing a failure in which clay beds of that sort squirt out at the bottom and you lose the base of your burden and when that happens, of course, all of the weight of this comes down and keeps accelerating that burden on out and it moves out at increased velocity. It starts out slowly. This is the typical creep and flow problem. To start with the type we studied frequently and as the time goes on acceleration increased until finally the thing gets moving quite rapidly. And you end up then with the most severe break you could possibly have.

Q. With that type of break how far would you anticipate that that would proceed out into the pit or out where it is moving?

A. Well, here we have a considerable depth. I have seen that sort of thing break out three to four hundred yards. I think that is the figure that we had at the North Branford quarry in New Haven or in North Branford, Connecticut, just out of New Haven. The rock broke out in that case, and it went clear out over the edge of the quarry, which is about three hundred yards from the face.

Q. How high was the face?

A. The face was about the same height, about eighty feet high; about eighty to one hundred feet high." (R. 211, 212 and 213.)

"Q. What is expected in blasting at the base of a bank with reference to the angle of the bank?

A. Well of course, that is going to increase the pitch. It is going to get to the very maximum pitch as far as the face is concerned. And, in fact, you might sometimes get even a little

hangover. If you ever got that then you would expect in a case like that it get quite a bit of sloughing off and so forth until you get back to the vertical.

Q. It more or less squares it off, is that right?

A. It certainly squares it off and increases the hazard." (R. 214.)

"Q. Well what happened up here at White Hil?

A. Well, I think that is what happened.

Q. Where did it break?

A. It looked to me from the evidence that is up there now that I examined that it broke out at the bottom, broke out the bottom along that clay plane and the burden then pushed it out so then it moved out a lot farther than it would if it had just broken and just fallen right down from the top." (R. 219.)

"Q. The blasting, in your judgment, had nothing to do with this slide?

A. No. That is not correct. I thing the blasting had one hundred per cent to do with the slide, but not one blast. It was a whole series of blasts that shaped this whole quarry up into a metastable condition." (R. 226.)

"Q. I didn't ask you that. I asked you if that changed your picture of this operation?

A. Not particularly, not particularly, because I don't think the explosives did it. That is, a single shot didn't do this. A single eight foot shot, or whatever you had, didn't do this. It was a matter of shaping it up over a period of time. Now you don't have to worry about forty thousand pounds of rock if you are actually undercutting and throw-

ing your center of gravity out of position. A match, you know, can start a conflagration.

Q. Okeh. But your assumption is based upon the fact that there was a vertical cliff for two hundred fifty to three hundred feet, between eighty and one hundred feet high, all around here with no support?

A. That is, that there was essentially that, with a high face, a high face all the way around. It doesn't need to be that high. If it is in excess of thirty feet it becomes hazardous in a case like this.

Q. Now if it is in excess of thirty feet how extensive would it have to be?

A. Well, the greater the height above thirty feet the more hazardous.

Q. No, I mean in width?

A. Well the length around isn't a particularly important factor except on how much comes down. This might be only ten feet wide and it would still come down. Well, it would have to be wider than that. One hundred feet would come down pretty freely.

Q. What would come down?

A. The whole burden, if you had the bottom slip out from under by virtue of the weight of the rock on top of it and then it doesn't make any difference whether it is one hundred feet or whether it is two hundred feet wide or thirty feet wide, it still comes down. It is the downward force that pulls it, not any side-ward force.

Q. What makes it slip out?

A. Well, the weight of the burden. This sort of slippage is quite prominent where the weight of the burden on a weak spot in the face forces out this weak spot, forces out a

layer of material that moves out much more easily than others.

Q. And the blasting had nothing to do with that?

A. Well I wouldn't think that the blasting, that one blast itself would have much to do with it because here particularly the one we have described, we have fifteen to twenty pounds of explosive. That explosive can lift maybe one hundred tons at most, and here we have something like a million tons coming down at once. The explosive didn't do that. That was the result of a metastable condition.

Q. What caused the earth to move, the slide to move the way this did?

A. Well, it had been standing there for quite some time before we started, before someone started to dig underneath with the shovel and so on.

Q. What do you mean, digging underneath?

A. Before anyone started to dig away the hill this thing has been there a long time. Scientists tell us millions of years, perhaps even thousands of years it certainly didn't come down. It didn't come down under the influence of the quake that we had around here that produced the Wasatch Fault. At least we don't think it did. Maybe it did. Maybe it got in the particular condition in which it was somewhat as a result of that. But it came down as the result of this operation that was going on in there, it seemed to me.

Q. Well any operation out there that removed the gravel would cause this slide?

A. No, indeed. You could run an operation like, that is an operation in a quarry like that and have no trouble if you do the thing according to correct principles.

- Q. Well then, we do come back to the blasting, don't we?
- A. It comes back indirectly to the blasting.
- Q. The reason for this, according to you, was because of the blasting?
- A. It comes back to this indirectly. Not as the result of the one blast but the whole series of blasts in which the whole pit was shaped in this particular hazardous condition." (R. 228-231.)
- "Q. So that out here in order for anyone to anticipate this, they would have to know that the clay went completely under the mountain, the walls would have to be high enough to remove completely this entirely around the area of the slide and sufficient blasting to have loosened it all up?
- A. No, I wouldn't go along with that at all. I would say as long as you are working in a quarry where the distance from the floor of the quarry to the top of the face is one hundred feet high you are in trouble.
- Q. You mean vertically?
- A. I mean as long as it is that far from the floor to the top of the quarry without any tiering in between. If you don't try to do it by a tiering process, coming down by a tiering process you are in trouble, and you are going to get it sometime or another. Now I believe an underlying clay bed would enhance the possibility of getting that trouble, but I think you are in trouble, even if you had a perfectly solid rock face and you are working on it, you have a floor that is one hundred feet below the top of the face, I think you are in trouble there." (R. 232 and 233.)

- “Q. And that doesn’t make any difference what is banked up against the side then?
- A. Not particularly. The loose material can’t help you much in maintaining a face. A loose material is not very good support for a face, I can assure you.
- Q. Then, as I get it, your evidence would be, Dr. Cook, that the minute you begin to take this material away, starting at the bottom and working up, you are in trouble?
- A. When you are working on a ninety foot face you are in a hazardous condition.” (R. 234.)
- “Q. Well, hazardous to whom? The fellow working there?
- A. To anyone working there or to any equipment within the range of the face.
- Q. Of what range?
- A. Within the range of which the material could slough.
- Q. Thirty feet?
- A. If you have a hundred foot face, two or three hundred feet.” (R. 235.)
- “Q. Would you say this, Dr. Cook, that anyone operating a gravel pit, experienced in the operation of a gravel pit, should know that it was dangerous to leave equipment within a distance of a face of a cliff that was sixty-five feet from the floor to the top and vertical or approximately vertical half way?
- A. Well I think in a gravel pit like that people would recognize a hazard to their equipment within a distance of maybe two hundred feet.
- Q. And anyone that left his equipment within that radius should know that he was leaving it in a dangerous position?

A. Yes. He should realize that he was leaving it in a dangerous position." (R. 239.)

"Q. Now you said, as I get it, if I misquote you why you tell me, this particular type of operation out here was a hazard that would be recognized by anyone operating a quarry? Correct?

A. Would you read that question to me?

. . . . The Reporter read back the last question put by Mr. Jones. . . .

A. Yes. I think that nearly anyone operating a quarry of that sort, that is, operating in the conditions that have been described to me here today, would regard it as a hazard.

Q. Now by a quarry do you mean a gravel pit too, or do you mean a quarry?

A. A gravel pit or a quarry, yes.

Q. I was just wondering, if you have never had any experience with this kind of operation, how you knew that?

A. Well actually there isn't much difference one type of open-pit operation to another. The only difference that I see here is the type of material involved. Now I have had experience with materials as loose and that will slough off as easily and that will break off as easily as this material, so I think the conditions are well recognized. It is a general sort of thing that when you have an operation like this you know it is a hazard, even if it were the best type of material. This actually is one of the worst types of material to work in." (R. 241.)

"Q. Mr. Jones just asked you if anyone would know that the operation of a quarry under the circumstances he outlined would be

hazardous, and who did you have in mind by his question anyway?

MR JONES: Well, just a minute. I don't think that correctly represents the testimony. I said if the Doctor had said that the peculiar operation would be a hazard recognized by anyone operating a gravel pit that they would recognize it. I was quoting the Doctor and he said that that was correct that I did quote him. I wasn't making the statement.

Q. Well I misunderstood it. Will you explain then, Doctor, what you meant by anyone?

A. Well I naturally would have to be someone that knows enough about operations to realize the problems in a blasting operation. Now not everyone in the world would recognize this hazard, of course, but blasters that have had any real amount of experience, or anyone who has operated a gravel pit, I am sure would be enabled to look at that situation and recognize the hazard immediately." (R.243.)

"A. Yes. The thing that I was wanting to point out at that point was that the evidence that you see there is almost, it is completely unmistakable to the effect that the bottom did break out. Had not the bottom broken out in that particular case, in my opinion, it would have been possible for the slough off to have occurred that did occur. In other words, for that, for the particular condition that we see up there now one knows very surely that the base, that the thing broke from the base and not from a distance up the face." (R. 244.)

The only rebuttal of the foregoing evidence was the

testimony of Lewis Keith, superintendent for the respondent and not their usual gravel pit operator, and two officers of the respondent company.

Lewis Keith testified concerning the nature of the pit; verified the blasting operations as explained by the earlier witnesses; stated that a slough off of a blast would go out forty or fifty feet (R. 357); testified that there was some clay some of which was wet (R. 360); and that the reason for operating this pit in the manner described was that it was cheaper and less expensive since it did not require double handling of the material (R. 365).

It was also his opinion supporting the conclusions drawn by Dr. Cook that the face hadn't fallen over (R. 368); which is also in conformity with the exhibits which show that the base of the cliff must have slipped out since there is top soil on top of the material which moved in the landslide. He testified that the defendant, Gibbons & Reed Company, had a regular gravel pit operator by the name of Webb Miller, who was not called as a witness, whose primary duty was the supervision of gravel pit operations (R.379, 400), that he did not talk to Webb Miller concerning the operation conducted at White Hill Sand and Gravel (R. 379), and there were engineers employed by the respondent company with whom he could have consulted concerning the operation at the pit and the blasting carried on in connection therewith (R. 411).

Richard Reed, one of the officers of the respondent

company, testified that he had been with the company since 1925 and that the company operated gravel pits all over the western states which operations were under his direct supervision and that the company owned four specific gravel pits. He verified that the company had engineers who had training and experience with gravel pits and blasting who could have been consulted in connection with this operation (R. 411). He, in addition to the superintendent and Pat Gibbons, were the only ones who testified that they did not observe any factors indicating the possibility of a slide; however, he admitted that he had not been to the pit since September 15 approximately one month before the slide. He testified that he didn't know about safety regulations issued by the Industrial Commission but that he did know about the blasting that was being conducted and the clay base.

Pat Gibbons, another officer of the company, stated that he had been familiar with gravel pit operations for 13 years and that he had not seen any suspicious circumstances in connection with this operation; however, he admitted that he did not know about the clay base or the water and that when he had seen the bank it was approximately 40 feet high (R. 418-419). He testified that he knew about the safety regulations but didn't know that they required that the banks be sloped (R. 419).

It is respectfully submitted that the foregoing evidence supports the appellant's contention that the respondent did not exercise that degree of care which

a reasonably prudent gravel pit operator would have exercised under the circumstances of this case considering the factors heretofore mentioned as follows:

1. The gravel pit was operated with a practically vertical bank extending from 60 to 100 feet in height.

2. The gravel material was located on a wet, clay base.

3. Water ran through the gravel down to and along the clay washing therefrom the fine material holding the coarse gravel formation in tact.

4. The respondent blasted with dynamite vibrating and further loosening the formation of gravel at its base.

5. The operation of the pit was not in compliance with the general safety orders issued by the Industrial Commission of the State of Utah which required that the bank be sloped.

6. The pit was not operated in the normal and usual manner for gravel pits of this type since the bank should have been terraced into a gradual slope of successive levels when they were removing the material from the bottom rather than from the top of the foundation.

7. The respondent owns and operates other gravel pits and is familiar with the normal and usual procedures.

8. The operation in this gravel pit was not done by the respondent's regular gravel pit operator but rather by a foreman whose primary duties were not the supervision of gravel pit operation.

9. The respondent has available safety engineers with whom the gravel pit operator could have consulted

in connection with the removal of the gravel and the blasting.

10. The respondent was warned by Mr. Hyde that the operation was dangerous.

11. The operator of a shovel for respondent refused at one time to work in the pit as it was being operated.

/ 12. Men sent to the operation from a commercial blasting company refused to blast under the circumstances under which the pit was being operated.

13. Witnesses testified that it could be reasonably anticipated, foreseen and expected that the operation of the gravel pit as conducted by the respondent would result in a slide.

It cannot be said considering such evidence that as a matter of law reasonable minds could only draw the conclusion that the respondent had acted with due care; but rather the least that can be said considering the evidence is that reasonable minds could draw different conclusions and, therefore, the issue of negligence should have been submitted to the jury.

Although the respondent raised the issue of insufficient evidence of a violation of a duty owed to the appellant, the argument was primarily based on the ground that there was "no evidence of any negligence of the defendant which was a proximate cause of the damage, if any, sustained by the plaintiff, in that there is no evidence from which the jury could find that the defendant could reasonably have foreseen or anticipated the occurrence or events which resulted in the damage, if any, sus-

tained by the plaintiff (appellant).” This statement seems to state the proposition that to establish proximate cause the results must have been reasonably foreseen or anticipated. It is submitted that the question of foreseeability is not a consideration in determining the presence of proximate cause. See annotation entitled “Foreseeability” as an Element of Negligence and Proximate Cause,” 155 A.L.R. 157.

The Utah Court from an early date has been committed to the “natural and probable consequences” test of proximate cause recently stated as follows :

“Generally speaking, the proximate cause of an injury is the primary moving cause without which it would not have been inflicted, but which in the natural and probable sequence of events, and without the intervention of any new or independent cause, produces the injury.”

Cox vs. Thompson, Utah, 254 P. 2d 1047, and authorities cited therein. The case further cited the “substantial factor” test as promulgated by the Restatement of the Law of Torts, Vol. II, Sec. 411.

The law is well settled that one need not foresee the exact nature or extent of the harm to be held liable. The Restatement of the Law of Torts, Vol. II, Sec. 435 states :

“It the actor’s conduct is a substantial factor in bringing about harm to another, the fact that the actor neither foresaw or should have foreseen the extent of the harm or the manner in which it occurred does not prevent him from being liable.”

Prosser on Torts, Sec. 48, page 340, states as follows:

“The prevailing view holds the defendant liable for consequences directly caused by his negligence, although he could not have foreseen or anticipated them at the time.”

In the early case of *Stone vs. Railroad*, 32 Utah 205, 89 P. 722, the following rule was stated:

“But the test of liability is not whether, by the exercise of ordinary prudence, the defendant could or could not have foreseen the precise form in which the injury actually resulted, but he must be held for anything which, after the injury is complete, appears to have been a natural and probable consequence of his act.”

The recent case of *Mountain States Tel. & Tel. Company vs. Consolidated Freightways*, Utah, ~~232-242~~ P. 2d 563, reaffirms that rule of law wherein it was stated:

“Negligence is the proximate cause of damage even though the actor was not able to foresee the injury in the precise form in which it occurred, nor to anticipate the precise damage which would result from his negligence.”

The respondent argued in support of its motions that although one could anticipate or foresee that the bank would cave in or slough off one could not foresee that a slide in the magnitude which occurred at the pi

could have been anticipated; therefore, the occurrence was in the nature of an act of God or was brought about by the forces of nature. The Restatement of the Law of Torts, Vol. II, Sec. 450 states another well settled rule of law as follows:

“The extraordinary operation of a force of nature, which merely increases or accelerates harm to another which would otherwise have resulted from the actor’s negligent conduct, does not prevent the actor from being liable for such harm.”

In viewing all of the factors in connection with the slide which occurred and looking back from the harm to the actor’s negligent conduct it cannot be said that “it appears highly extraordinary that the negligent conduct should have brought about the harm.” Restatement of the Law of Torts, Vol. II, Sec. 433, *Coray v. Southern Pacific Co.*, 112 Utah 166, 185 P. 2d 963. It is manifest in view of the evidence in this case that the respondent could have and should have foreseen and anticipated that its conduct created an unreasonable risk of damage to men and equipment operating within the pit and the fact that the respondent could not foresee the extent of the slide is of no consequence. Certainly whether respondent could or should have foreseen the consequences or whether the respondent had created an unreasonable risk to the appellant’s equipment was a question which the jury should have been permitted to decide.

B. Assumption of Risk or Contributory Negligence

The third and fourth ground argued by the respondent in support of its motion for a directed verdict seems to set out the defenses of assumption of risk and contributory negligence. The testimony of the appellant pertaining to these issues was to the effect that his first knowledge of the use of his shovel in the pit under the circumstances of this case was derived by his going to the pit at approximately 3:00 o'clock p.m. the day before the slide occurred (R. 291, 301). Upon arriving there he told the shovel operator that the pit was dangerous and asked him to take the shovel out of the pit. The operator replied that he could not remove the shovel unless so authorized by his employer, Mr. Newman (R. 291, 301). Thereafter the appellant testified that he attempted to locate Mr. Newman or representatives of the respondent, Gibbons & Reed Company (R. 301). He stated that he did not take it upon himself to personally remove the shovel and that he thought the operator would remove the shovel (R. 302). The slide occurred during the evening of the Saturday afternoon that appellant was present at the pit (R. 302). Under the tension and strain of cross examination as to why he did not personally remove the shovel instead of attempting to locate Newman, he testified that he had his good clothes on and didn't want to leave his car in danger (R. 302).

In view of this evidence and the law it is clear that the appellant did not assume the risk of the danger involved.

In the recent case of *Clay vs. Dunford*, Utah, 239 P. 2d 1075, this court discussed the doctrine of assumption of risk and contributory negligence. The court stated that there must be present two essential elements to establish assumption of risks; first, knowledge of the danger, and second, voluntary exposure to that danger. The appellant testified that he recognized the danger but under the facts of this case it cannot be stated that he voluntarily exposed his equipment to that danger. He requested the operator to remove his shovel and proceeded to attempt to locate either Newman or men working for Gibbons & Reed who would have the authority to direct the operator to remove it. Such conduct certainly does not constitute an intentional or voluntary consenting to the risks apparent from the operation.

The Restatement of the Law of Torts, Vol. II, Sec. 460, defines contributory negligence as follows:

“The plaintiff’s contributory negligence may be either

- (a) An intentional or unreasonable exposure of himself to danger created by the defendant’s negligence of which danger the plaintiff knows or has reason to know, or
- (b) Conduct which, in respects other than those stated in clause (a), fall short of the standard to which the reasonable man should conform in order to protect himself from harm.”

The matter discussed in sub paragraph (a) above would seem to cover the defense of assumption of risk and would not apply in this case since the appellant could

not be said to have intentionally exposed himself to the danger created by the respondent's negligence. Whether the appellant's conduct falls short of the standards to which a reasonable and prudent man would conform was an issue for the jury. And whether a reasonable and prudent man under the circumstances would have acted as the appellant did or would have taken it upon himself to remove the shovel when the operator had refused to do so without authorization from his employer certainly is a matter upon which reasonable minds could draw different conclusions. In the recent case of *Gibbs vs. Blue Cab, Inc.*, Utah, 249 P. 2d 213, although there were numerous acts and circumstances drawn from circumstantial evidence adverse to the plaintiff upon which the Trial Court ruled that there was contributory negligence as a matter of law the Supreme Court reversed the Trial Court holding that the question of contributory negligence should have been submitted to the jury and in so doing stated as follows:

“We are committed to the principle that matters of negligence, contributory negligence and proximate cause generally are jury questions, unless the evidenciary facts are of such conclusive character as to require all reasonable minds to conclude that the ultimate fact of negligence, contributory negligence or proximate cause does or does not exist.”

In the case of *Cox vs. Thompson*, Utah 254 P. 2d 1047, it was stated in determining whether the decedent had been contributorily negligent as a matter of

law, "the evidence, and all reasonable inferences therefrom, must be viewed in the light most favorable to plaintiff," citing *Finalyson vs. Brady*, Utah, 240 P. 2d 491; *Lingus vs. Olsson*, 114 Utah 504, 202 P. 2d 495. Viewing the evidence and all reasonable inferences therefrom in the light most favorable to appellant it cannot be said that the evidenciary facts are of such conclusive character as to require all reasonable minds to conclude that the appellant was contributorily negligent. The statements of the Utah Supreme Court in the case of *Stickle vs. Union Pacific Railroad Company*, Utah, 251 P. 2d 867, masterfully summarizes the appellant's position that under the circumstances of this case he should not be denied the inviolable right and privilege to have his case decided by eight impartial jurors. The court in that case stated:

" In our democratic system, the people are the repository of power whence the law is derived; from its initiation and creation to its final application and enforcement, the law is the expression of their will. The functioning of a cross-section of the citizenry as a jury is the method by which the people express this will in the application of law to controversies which arise under it. Both our constitutional and statutory provisions assure trial by jury to citizens of this state.

"Courts, as final arbiters of law, could arrogate to themselves arbitrary and dangerous powers by presuming to hold to themselves and determine questions of fact which litigants have a

right to have passed upon by juries. Part of the merit of the jury system is its safeguarding against such arbitrary powers in the courts. To the great credit of the courts of this country, they have been extremely reluctant to infringe upon this right, and by leaving it unimpaired have kept the administration of justice close to the people. Of course, the rights of litigants should not be surrendered to the arbitrary will of juries without regard to whether there is a violation of legal rights as a basis for recovery. The court does have a duty and a responsibility of supervisory control over the action of juries which is just as essential to the proper administration of justice as the jury itself. Nevertheless, we remain cognizant of the vital importance of the privilege of trial by jury in our system of justice and deem it our duty to zealously protect and preserve it.

"A very fine statement of the proper attitude toward this right was expressed for this court by the late Mrs. Justice Frick in *Newton v. O. S. L. R. R.* where, in referring to the question of submitting plaintiff's contributory negligence to a jury, he made these statements:

'The court can pass upon the question of negligence only in clear cases.'

* * *

'... unless the question of negligence is free from doubt, the court cannot pass upon it as a question of law; ... if ... the court is in doubt whether reasonable men in viewing and ... might arrive at different conclusions, then this very doubt determines the question to be one of fact for the jury and not one of law for the court.'

CONCLUSION

The appellant respectfully submits that all of the facts of this case are such that the appellant was properly and lawfully entitled to have the jury determine the issues of negligence, proximate cause and contributory negligence. The jury did in fact consider these issues under proper instructions and returned a unanimous verdict in favor of the appellant. To now say that reasonably prudent men could only draw a contrary conclusion in face of such a verdict where eight persons who as reasonably prudent men have found otherwise would not appear to be logical, reasonable or just. The appellant, therefore, respectfully requests that this court order the Trial Court to enter judgment on the verdict returned by the jury.

Respectfully submitted,

DAN S. BUSHNELL,

Attorney for Appellant.