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James S. Devine et al v. Helen Cook and W. S. Hatch Co., Inc. : Brief of Appellants

Utah Supreme Court

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IN THE
SUPREME COURT
OF THE
STATE OF UTAH

JAMES S. DEVINE, MRS. JAMES
S. DEVINE and JANET GUSINDA,

Plaintiffs and Appellants,

— vs. —

HELEN COOK and W. S. HATCH
CO., INC.,

Defendants and Respondents.

FILED
JUL 16 1954
Supreme Court, Utah

Case No. 8145

BRIEF OF APPELLANTS

RICHARDS & BIRD, and
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BRIEF OF APPELLANTS

STATEMENT OF FACTS

This is an action arising out of an automobile collision in which the automobile owned and driven by the plaintiff, James S. Devine, collided with an automobile

driven by the defendant, Helen Cook. The collision occurred at the intersection of 1500 South Street, Bountiful, Utah and U. S. Highway 91, (Tr. 5, 6). The plaintiffs were all in the car proceeding north going to Ogden on U. S. 91; the defendant Helen Cook had been proceeding east on 1500 South Street and had come to a stop at the stop sign where said street intersected with the through highway. A tank truck and four-wheel trailer and a tractor pulling a semi-trailer transporting a tank owned by the defendant W. S. Hatch Company had also been proceeding north on U. S. Highway 91, but had slowed down and one of the trucks had come to a stop in preparation of turning left to go west on 1500 South St., (Tr. 7, 15, 16). Although the driver of the first truck stated that he did not remember motioning or signalling to Mrs. Cook to proceed across the intersection, (Tr. 174) Mrs. Cook and a witness, Elora Hutchings, both testified that the driver had motioned or signalled to Mrs. Cook to clear the intersection, (Tr. 50, 60). The truck drivers stated that they could not make a left turn until Mrs. Cook had cleared the intersection, (Tr. 174, 175). The defendant Cook stated that upon being signalled by the truck drivers to clear the intersection she proceeded across U. S. Highway 91 until she passed in front of the truck, at which time she first noticed the automobile of the plaintiff. Then it was too late to avoid the collision, (Tr. 61). The plaintiff, James S. Devine, testified that the two tankers had previously passed his automobile; however, as they approached the intersection they began to slow down and

he assumed that they were either going to stop or make a left turn, and he likewise began to slow down. As he overtook the last tanker he glanced between the two trucks and saw a flash or a blur and he immediately put on his brakes, pulled over to the right shoulder of the road but he was unable sufficiently to stop his car to prevent the collision, (Tr. 16). The left front of the Devine car collided with the right front of the Cook car.

At the time of the collision Mrs. Devine stated that she was riding in the front seat, sitting sideways with her back toward the right hand front door talking to her sister who was riding in the back seat, (Tr. 68). As a result of the collision Mrs. Devine received a fractured rib, (Tr. 70), a fractured metatarsal bone in the foot and a tooth was knocked loose, which resulted in the nerve becoming dead and required extraction thereof and a replacement with an artificial tooth by means of bridge work, (Tr. 69). The plaintiff, Miss Gusinda received various bruises and bumps and complained of pain in her back and it was later determined or diagnosed that she was suffering from a ruptured inter-vertebral disc, (Tr. 122, 150). In addition to general pain and soreness in the area of her back upon three separate occasions prior to the time of trial, the disc had protruded into the spinal column, causing severe pains and temporary or partial paralysis, or inability to use her legs, (Tr. 89, 91, 150). The plaintiff, Dr. Devine, is seeking to recover damages to his automobile and personal injuries suffered as a result of a moderate brain concussion, (Tr. 22), caused

from a blow upon his head, and all of the plaintiffs are seeking special damages in addition to their general damages.

The defendants in their answer denied negligence and also pleaded contributory negligence of Dr. James S. Devine as being the sole and proximate cause of the collision and resulting injuries. The case was tried before a jury which returned a verdict of no cause of action as to all three plaintiffs. Although the defendants did not specifically plead any contributory negligence on the part of Mrs. Devine and Miss Gusinda, passengers in the automobile driven by Dr. Devine, the court permitted the defendants prior to instructing the jury to amend their pleadings to allege contributory negligence on the part of such passengers, (Tr. 188), and the court then proceeded to instruct and submit to the jury the issue of contributory negligence as to all of the plaintiffs.

STATEMENT OF POINTS

POINT I.

THE INSTRUCTIONS PREJUDICIALLY ACCENTUATED THE DUTY OF THE PLAINTIFFS AND MINIMIZED THE DUTY OF THE DEFENDANTS.

POINT II.

IT WAS ERROR TO INSTRUCT THE JURY ON AN ISSUE OF CONTRIBUTORY NEGLIGENCE OF THE PLAINTIFFS, MISS GUSINDA AND MRS. DEVINE.

POINT III.

THE COURT'S INSTRUCTIONS REGARDING CONTRIBUTORY NEGLIGENCE WERE ERRONEOUS AND PREJUDICIAL.

ARGUMENT

POINT I.

THE INSTRUCTIONS PREJUDICIALLY ACCENTUATED THE DUTY OF THE PLAINTIFFS AND MINIMIZED THE DUTY OF THE DEFENDANTS.

Instruction No. 1 contained the statement of the court as to the allegations of the plaintiffs concerning negligence of the defendants and the answer of the defendants alleging contributory negligence on the part of the plaintiff, James S. Devine.

Instruction No. 2 concerned the burden of proof and the necessary allegations which must be proved by the plaintiffs and specifically mentioned that the court would further instruct the jury "relative to contributory negligence as it applies respectively to the plaintiffs."

Instruction No. 3 defined the terms: negligence, contributory negligence and proximate cause.

In Instruction No. 4 the court specifically instructed the jury as to the issue of contributory negligence and in so doing in part stated as follows:

"You are instructed that if you find by a

preponderance of the evidence that Dr. James S. Devine was guilty of contributory negligence, which in any degree contributed to the happening of this accident, he cannot recover even though you find that one or both of said defendants was negligent in the happening of this collision. It is the law of this state that a plaintiff who is negligent and such negligence proximately contributes to the happening of the accident in question that he cannot recover. Therefore, you are instructed that if you find Dr. Devine was negligent, as I have above indicated, and the same proximately contributed to the happening of the collision he cannot recover."

The court, in the same instruction, advised the jury that if Dr. Devine's negligence was the sole proximate cause of the collision then the other two plaintiffs could not recover against the defendants. The court continued as follows:

"In this connection you are further instructed that if you find either one of the woman plaintiffs guilty of contributory negligence which in any degree proximately contributed to the happening of the collision then and in that event such plaintiff so guilty cannot recover."

So far as the above instructions go they would not be objectionable except as argued in Point III. However, in reviewing the balance of the instructions which in two other separate and specific instructions again instructs on the issue of contributory negligence there appears to be prejudicial error.

Instruction No. 5 contains a general instruction as to the operation of vehicles upon the highway with reference to speed, starting, stopping, slowing down, turning, keeping a proper lookout, etc. Such instruction as applied to all of the parties was no doubt proper. However, Instruction No. 6 again reverts to the issue of contributory negligence on the part of the two plaintiffs who were passengers in the automobile. The instruction provided as follows:

“You are instructed that *it is the duty of guests* in an automobile to use all reasonable precautions for their own safety, and in the discharge of such duty, *they are required to see and to warn the driver* of the automobile in which they are guests of the dangers which a reasonable and prudent person riding as a guest in the automobile of another would use for his own safety; and if they fail to use such reasonable care they are negligent, and if such negligence possibly contributes to any extent, however slight, to produce their injury they cannot recover. Thus in this case, if you find that at the time of the collision and resulting injuries, if any, the plaintiffs, Janet Gusinda and Mrs. James S. Devine, or either of them, were guests in the automobile driven by James S. Devine, and that a reasonable and prudent person under all of the facts and circumstances as shown by the evidence should have seen the danger of the collision which caused their injuries, if any, and would have warned James S. Devine of such danger, and that by such seeing and warning, the collision and injuries, if any, may

have been averted, *and that they, or either of them, failed to see the danger or failed to warn James S. Devine of it*, and that such negligence contributed to produce the collision and resulting injuries, if any, then the person who was guilty of such negligence cannot recover for her injuries, and your verdict in the action brought by her must be in favor of the defendants and against the plaintiffs.” (Emphasis added.)

It will be noted by the foregoing instruction that the court commences the instruction by stating that it is a positive duty of the guests to see and to warn the driver if, under the circumstances a reasonable and prudent person would do so, and then particularly identifies these plaintiffs and again repeats that if they failed to see or warn the driver such conduct would constitute negligence and would bar their recovery. Contrast this instruction with Instructions No. 7 and No. 9 pertaining to the duty of the two defendants and again the Instruction No. 8 as to the duty of the driver Dr. Devine. Instruction No. 7 was as follows:

*“You are instructed that a driver of a vehicle upon a highway has no duty to ascertain or advise other drivers whether they may safely enter upon or pass over said highway; but if the driver undertakes to make such a determination and does so advise others, then he must exercise reasonable caution, circumspection and care that his conclusions are correct.” * * **

The Court then proceeded to discuss whether W. S.

Hatch Company, through its drivers, did undertake to determine whether the defendant, Helen Cook, could safely enter and pass through the intersection. The instruction proceeds first with the negative that there is no duty except under certain circumstances.

Instruction No. 8, pertaining to the duty of James S. Devine, provided in part as follows:

“You are instructed that *it was the duty* of James S. Devine in driving down the highway toward the intersection in which this collision occurred to keep a reasonable and adequate lookout, * * * to use reasonable care * * * to avoid the hazzards. * * * It was the plaintiff James S. Devine’s duty to observe the relative position of other vehicles on the highway, the existence of the intersection, and to proceed in such a manner that he would keep his vehicle under reasonable control and prevent the same from colliding with other objects or vehicles lawfully upon the highway. If you find that the plaintiff James S. Devine at said time and place failed to exercise reasonable control of the vehicle he was driving, then he would be negligent.” (Emphasis added.)

This specific narrative type instruction discussing the conduct of the plaintiff, James S. Devine, was unnecessary in view of Instruction No. 5 covering the duties of drivers generally, and Instruction No. 4 on Contributory Negligence. Again note the positive nature of the instruction as to what was required of the plaintiff.

The contrast between Instruction No. 8 and Instruction No. 9, which follows, is again significant:

“You are instructed that the law does not require a person to be extraordinarily alert, or to foresee all that can be seen by looking back after the happening of an accident. Where a person exercised reasonable and ordinary caution; that is, a degree of care, which would ordinarily be exercised by a reasonable and prudent person, *he is not negligent*. In this case, the defendant, Helen Cook, *was not under a duty to foresee* all that she might at this time be able to foresee or appreciate by looking back at the accident, *nor was she required to use extraordinary caution* for the avoidance of any injury that she could reasonably have expected under the circumstances. If you find from the evidence in this case that this defendant did observe that degree of care and caution that should be ordinarily observed by ordinarily prudent persons under similar circumstances, then you are instructed that the defendant, Helen Cook, discharged the duties imposed upon her and you should return a verdict in her favor.” (Emphasis added.)

It will again be noted that the instruction is by its terms negative.

Instructions No. 4, 6 and 8 pertaining to the standard of care and contributory negligence are positive and peremptory, while Instructions 7 and 9 pertaining to the standard of care required of defendants are negative and nugatory.

Instruction No. 10 is a general instruction that there are sometimes collisions which are unavoidable accidents and if the jury found that this collision was caused not by any negligent conduct of any of the parties they could find that it was an accident. The balance of the instructions are stock instructions or deal with the issue of damages.

The instructions cast doubt upon the case of the plaintiffs by frequent use of the words "if any" in reference to the collision and injuries. As an example part of instruction stated as follows:

"Thus in this case, if you find that at the time of the collision and resulting injuries, *if any*, the plaintiffs Janet Gusinda and Mrs. James S. Devine, or either of them, * * * should have seen the danger of the collision which caused their injuries, *if any*, * * * and that by such seeing and warning, the collision and injuries, *if any*, * * * and that such negligence contributed to produce the collision and resulting injuries, *if any*, * * *"
(Emphasis added.)

No such qualifying terms were used when referring to negligent conduct of these plaintiffs. Rather the concluding part of the instruction states:

"And that they, or either of them failed to see the danger or failed to warn James S. Devine of it, and that *such negligence* contributed to produce the collision and resulting injuries, if any, then the person who was guilty of *such negligence*,

cannot recover for her injuries and your verdict in the action brought by her must be in favor of the defendants and against the plaintiffs." (Emphasis added.)

By such qualifying terms the court cast doubt as to the existence of any injuries suffered by the plaintiffs and characterizes the conduct of the plaintiffs as being negligent. This accentuation of the defendant's case, as included in the instruction requested by the defendants, was one more factor tending to discredit the claim of the plaintiffs and obviously caused the jury to believe that the court thought the plaintiffs were negligent and their alleged injuries were fallacious.

In addition to emphasizing the positive requirements and duties of the plaintiffs and stating in the negative manner the duties of the defendants the court continually and repetitiously instructed the jury concerning the contributory negligence of the defendant. The court not only mentioned the issue of contributory negligence in the first instruction pertaining to the allegations of the plaintiffs, in the second instruction dealing with the burden of proof, and in the third instruction in defining the terms, but specifically instructed the jury as to the contributory negligence of the plaintiffs in three of the other instructions pertaining to liability. Instruction No. 4 discusses contributory negligence of all of the plaintiffs, Instruction No. 5 deals with the general duty of all drivers, Instruction No. 6 the contributory negligence of the plaintiffs, Miss Gusinda and Mrs. Devine, and In-

struction No. 7 the duty of the truck drivers. And then again in Instruction No. 8 the court returned to the issue of contributory negligence of the driver James S. Devine. In Instruction No. 9 the court minimized the duty of the defendant, Helen Cook, and in Instruction No. 10 discusses unavoidable accidents. Punctuated throughout the entire group of instructions as to liability is the continual and repetitious discussion of contributory negligence.

The court in the case of *Keeshin Motor Express Co., Inc. et al v. Glassman*, 219 Ind. 538, N.E. 2d 842, 850 had occasion to consider repetition of instructions as a ground of reversible error. The court reviews in some detail cases on this subject matter and cites at page 853 of the North Eastern 2d Reporter numerous cases which granted a reversal on the sole ground of repetition of instructions. Other cases are cited where repetition of instructions was one of the grounds for reversal. The court held as follows:

“With this situation it was incumbent upon the trial court in his instructions to clarify the issues without giving any of them undue prominence. This was not done. The instructions as a whole are lengthy, intricate, repetitious, argumentative and confusing. The tend, to appellant’s disadvantage, by needless repetition to draw the jury’s consideration away from the conduct of appellee’s brother and to lead the jury to believe that, in the court’s opinion, what he did or failed to do was of little consequence.”

The Utah court in the case of *Shields v. Utah Light*

& *Traction Co.* 99 Utah 307, 105 P. 2d 347, 349 stated that "the reiteration of given propositions to the jury in the instructions does not have judicial approval." After reviewing in some detail the instructions the court held:

"And the resulting emphasis on applicable laws unfavorable to plaintiff's side as the result of continual reference and repeating of certain law propositions resulted in the unbalancing of the charge, and error."

Certainly continual repetition of instructions on contributory negligence and the positive delineation of the duties of the plaintiffs, as contrasted with the qualified negative statement of the duties of the defendants, only permitted the jury to return its verdict of no cause of action. The instructions taken as a whole, even assuming they were correct as given, constitutes prejudicial error.

POINT II.

IT WAS ERROR TO INSTRUCT THE JURY ON AN ISSUE OF CONTRIBUTORY NEGLIGENCE OF THE PLAINTIFFS, MISS GUSINDA AND MRS. DEVINE.

As previously stated the defendants did not plead contributory negligence on the part of the two passengers in Dr. Devine's automobile. Only after the case had been tried and the court had indicated the instructions which were to be given, and upon objection by counsel for the plaintiff that the issue of contributory negligence was not supported by the pleadings or the evidence, were the

pleadings amended to raise the issue of contributory negligence as to each of these two plaintiffs. It is submitted that the evidence did not support any instruction on this issue. No witnesses other than the plaintiffs themselves gave any testimony concerning their conduct or what happened so far as these plaintiffs were concerned. The complete testimony of these two witnesses, as to what they observed and what they did prior to the collision indicates that there was no basis for the charge that they did not act as reasonable and prudent persons.

Mrs. Devine testified as follows:

“A. I was talking to my sister who was in the back seat. I was sitting sideways and I noticed the two big oil tankers passing us up and then they began to slow down and I noticed that our car was slowing down; and then I was looking at the oil tankers and I noticed this blur, and then I felt our car brakes being put on and the next thing I heard was coming to and trying to get air, trying to breathe, but my lungs and chest wouldn't expand enough and I thought I was dying.” (Tr. 68).

Upon cross examination the witness, Mrs. Devine, testified as follows:

“Q. You were looking out the window, out the front window all the time?

- A. No, I was sitting sideways in the car, talking to my sister and looking out at the tankers.
- Q. And you were looking out the side at the tankers, is that correct? As you were going from Salt Lake to the point where the accident occurred, were you observing the highway?
- A. Yes.
- Q. Did you see Mrs. Cook's car prior to the collision?
- A. Yes.
- Q. Did you assume that to be the car that you later collided with?
- A. After I came to, yes.
- Q. Now did you say anything to your husband about that car?
- A. Well, I imagine so. I don't get excited that way.
- Q. Pardon?
- A. I don't become excited that way.
- Q. In other words, you didn't become excited so you didn't say anything to your husband about the car then?
- A. No.
- Q. You didn't tell him about this blur you saw crossing the highway?
- A. No, because he had put on the brakes at the same time that I saw it." (Tr. 79).

The testimony of the plaintiff, Miss Gusinda, was as follows:

"A. Well, we were coming down this road, we were on our way to Ogden and we were driving

abreast of these two tanker trucks. I think we were behind the second one and at first they were passing us and then we started to gradually catch up to them and I remember that at the time I thought I saw a wheel or something on the other side of the road. I am rather mixed up on that part of it. Anyway, I thought the first truck went on and that this car came off of the side road and that was the one that hit us, that went in front of the trucks; the second truck cleared it."

Q. Alright. Where were you just prior to the collision?

A. I was sitting in the back seat of the car, just about in the middle." (Tr. 86).

And on cross examination the witness further testified:

"Q. Now returning for the moment to the accident, I believe you stated that you saw a wheel or something, some part of a car coming across the highway?

A. Yes, sir, I thought I did. But I don't know if it is hearsay or if it is what I heard after the accident.

Q. But your impression is that you saw a car coming across the highway?

A. Yes.

Q. You didn't say anything to the driver of the car in which you were riding, Dr. Devine, about it, did you?

A. But at the time the brakes were being applied." (Tr. 97).

The foregoing testimony, being all of the evidence of any negligence of these two plaintiffs, does not show any lack of due care or failure to act as a reasonable prudent person would have acted under the circumstances. If there is no evidence of contributory negligence, the law is clear that the jury should not be instructed on such an issue.

In *Christensen v. Oregon Shortline Railroad Company*, 35 Utah 137, 146, 99 P. 676, the court quoted with approval the following:

"Where the evidence of negligence is entirely inferential and the testimony for the defendant is clear and undisputed to the effect that there was no negligence, the plaintiff's case is overcome as a matter of law, and it becomes the duty of the Judge to take the case from the jury."

In this case there is no evidence on the part of the two passengers but rather their undisputed testimony shows no negligence and therefore the court should not have instructed the jury as to any contributory negligence on their part.

In *White v. City of Trinidad*, 52 Pac. 214, 10 Colo. App. 327, the court discussed the issue of submitting an instruction on contributory negligence even though there was no pleading or sufficient evidence to support the instruction. The court stated as follows:

“The evidence concerning her lameness was the only evidence by which contributory negligence was sought to be proved; and, while the evidence was inadmissible under the pleadings, it, for the purpose for which it was elicited, was a failure. It proved nothing against the plaintiff. But the jury may have regarded it as important, and as having a bearing on her right to a recovery, when they listened to the instruction of the court on the subject of contributory negligence. Instructions must be based on evidence. A correct declaration of the law is erroneous when there is no evidence to which it can be applied. It can have no effect except to mislead the jury, and, where an instruction of that nature has been given, we are bound to presume that the jury were misled by it. (Citation of Authority) The judgment must be reversed.”

In *Smith v. Oregon and N.W.R. Co.*, 33 Utah 129, 142, 93 P. 185, the court held that where there was a plea of contributory negligence but there was no evidence on which to predicate a charge on contributory negligence such an instruction should not have been given and also giving an instruction concerning an intervening cause without evidence to support the same constituted prejudicial error.

In *Belnap v. Widdison*, 32 Utah 246, 90 P. 393, 395 the court stated:

“The rule is well settled that instructions should be predicated upon the pleadings and evi-

dence in the case, and that an instruction, even though it may contain a correct statement of the law in the abstract, if it has no application to the issues and evidence in the case, should be refused. The reason for the rule is that instructions not pertinent to the case have a tendency to mislead the jury and to draw their minds from the issues in the case. The instruction, while it correctly states the law as an abstract proposition, has no application whatever to the facts in this case and was therefore erroneous, and the giving of it could not have been other than prejudicial to the interests of the plaintiff."

The court held in the recent case of *Clay v. Dunford*, 239 P. 2d 1075, that it was prejudicial error to instruct on the issue of assumption of risk when the facts in the case did not present such an issue. Likewise, it was prejudicial error in this case to instruct on the issue of contributory negligence as to the two passengers of the automobile, even assuming the instruction was valid as given. It is submitted however that the instructions were invalid as discussed hereinafter and also under point III.

By their testimony it is admitted that these plaintiffs did not distinctly see the car driven by the defendant, Mrs. Cook, and that they had no opportunity and did not warn the driver of their vehicle. Yet in spite of this the court instructs the jury as to contributory negligence of these plaintiffs without any further evidence of negligence or violation of a duty of reasonable care. The instruction is such that it amounts to a direction to the

jury to find these two defendants contributorily negligent. Instruction No. 6 stated:

“You are instructed that *it is the duty* of guests in an automobile to use all reasonable precautions for their own safety, and in the discharge of such duty, *they are required to see and to warn the driver of the automobile*, in which they are guests, of dangers which a reasonable and prudent person, riding as a guest in the automobile of another would use for his own safety, and if they fail to use such reasonable care, they are negligent, and if such negligence proximately contributes to any extent, however slight, to produce their injury, they cannot recover. Thus, in this case, if you find that at the time of the collision and resulting injuries, if any, the plaintiffs, Janet Gusinda and Mrs. James S. Devine, or either of them, were guests in the automobile driven by James D. Devine, and that a reasonable and prudent person under all the facts and circumstances as shown by the evidence would have seen the danger of the collision which caused their injuries, if any, and would have warned James S. Devine of such danger, *and that by such seeing and warning, the collision and injuries, if any, may have been averted, and that they, or either of them, failed to see the danger or failed to warn James S. Devine of it, and that such negligence contributed to produce the collision and resulting injuries, if any, then the person guilty of such negligence cannot recover for her injuries, and the verdict in the actions brought by her must be in favor of the defendants and against the plaintiff.*”

Although the instruction refers to conduct of a reason-

able person under the circumstances there can be no question but what the instruction as worded and given left the impression with the jury that the guests had a duty to see and to warn the driver. Yet the witnesses testified that they had not seen the automobile clearly enough to know that it was an automobile and that they had not had an opportunity to warn the driver. Under such circumstances the instruction practically amounted to a direction to find the plaintiffs guilty of contributory negligence. The law does not require that guests of automobiles observe, see and warn everything that might be a danger in the path of the vehicle.

In *Cento et al. v. Security Building Co.*, 99 S.W. 2d 1, (Mo. 1936) the plaintiff sought to recover damages sustained as a result of boards loaded in an elevator protruding through the top of the elevator and coming in contact with a beam across the top of the elevator shaft which caused the boards to buckle, break and strike the plaintiff. The jury found the case in favor of the defendant and a motion for a new trial was granted in favor of the plaintiff and the defendant appealed. One of the reasons for granting the new trial was an instruction on contributory negligence to the effect that the plaintiff should have observed the condition of the elevator shaft. The court's discussion concerning this point was as follows:

“We now take up the defendant's instructions 3 and 6 which plaintiff says were erroneous and

justified the court in granting the new trial. Instruction 3 told the jury that it was plaintiff's duty to exercise ordinary care to observe the condition of the elevator and shaft and that if it were found that, by the exercise of ordinary care, plaintiff would have observed the conditions existing inside the elevator shaft and that plaintiff did not observe the conditions inside the shaft, 'then his failure to do so was negligence.' This instruction, in effect, was peremptory, because plaintiff admitted that he did not give any attention to the shaft, insofar as looking up the shaft was concerned. If he had looked, he would have seen that there was a beam over the shaft only a few feet at most above the tops of the boards."

The court then discusses evidence which may have justified a proper instruction on contributory negligence and stated as follows:

"These questions are legitimate subjects for argument on the usual instruction on contributory negligence, but to peremptorily direct, in effect, that if plaintiff, under the facts here, did not discover the beam, he was guilty of negligence, we think was error."

Note the similarity of the instruction in the Missouri case with Instruction No. 6 in the present case. The Missouri court instructed the jury that if the plaintiff in the exercise of ordinary care would have observed the beam across the elevator shaft and did not observe such

condition "then his failure to do so was negligence." In Instruction No. 6 the Utah court instructed the jury that "they are required to see and to warn the driver of the automobile" of such danger which a reasonable and prudent person would have done and if "they or either of them failed to see the danger or failed to warn James S. Devine of it" and such negligence contributed to produce the collision and resulting injuries, the plaintiffs would be guilty of negligence and the jury must return a verdict in favor of the defendants and against the plaintiffs. The effect of such an instruction could only be to place undue importance and a higher degree of duty upon the plaintiffs which, coupled with the repetition of instructions on contributory negligence, must have influenced the jury to determine that there was in fact contributory negligence and therefore they felt compelled to return their verdicts of no cause of action.

The Missouri case in its decision reviewed a similar case of *Crawford v. Kansas City Stock Yards Co.*, 215 Mo. 394, 114 S.W. 1057, 1062, where the plaintiff was charged with contributory negligence in failing to observe gates on a stock pen near the railroad tracks. The testimony was that the plaintiff was watching the cattle in the railroad car and did not look and see or observe the gates. The Missouri court quoted the following from the Crawford case:

"The evidence shows that when he was coming down the stairway he would have seen them if he had looked, and it also shows that he did

not look, but that, on the contrary, he came down the stairway with his mind on the cattle, leaning over the railing with his face turned south. If the plaintiff saw the gates open, he was guilty of negligence in not taking care to avoid coming into collision with them; but the testimony is that he did not see them. Was he negligent because he did not look in that direction as he came down the stairway? As a general rule a man is not required to look for danger when he has no cause to anticipate danger, or when danger does not exist except as caused by the negligence of another."

In this case the passengers were under no duty to anticipate danger caused by the negligence of others, nor were they under any duty to specifically observe the condition of the road, or other vehicles thereon and to be prepared to warn the driver when there was no prior knowledge of any danger. Yet the court in effect so instructed the jury. The parties admitted that they did not see or observe the danger and did not have an opportunity to warn the driver. The court in substance instructed the jury that if they did not see and observe the danger and warn the driver they were contributorily negligent. Such an instruction peremptorily informed the jury that they must find a verdict against the plaintiffs.

The pleadings and the evidence did not support an instruction on contributory negligence of the two passengers. The instructions as given were prejudicially erroneous.

POINT III

THE COURT'S INSTRUCTIONS REGARDING CONTRIBUTORY NEGLIGENCE WERE ERRONEOUS AND PREJUDICIAL.

Instruction No. 4 provided in part as follows:

“You are instructed that if you find by a preponderance of the evidence that Dr. James S. Devine was guilty of contributory negligency *which in any degree contributed to the happening of this accident*, he cannot recover even though you find that one or both of said defendants were negligent in the happening of this collision. * * * In this connection you are further instructed that if you find either one of the woman plaintiffs were guilty of contributory negligence *which in any degree proximately contributed to the happening of the collision*, then and in that even such plaintiff so guilty cannot recover.” (Emphasis added)

Instruction No. 6, in part, provided as follows:

“* * * and if they failed to use such reasonable care, they are negligent, *and if such negligence proximately contributes to any extent, however slight, to produce their injury, they cannot recover.*” (Emphasis added)

The words “to any extent, however slight” or “in any degree” as used in the instructions, have been considered by many courts including the Utah Supreme Court. A basic distinction should be made in considering the above mentioned instructions. The words “how-

ever slight" or "to any extent" or "in any degree" may qualify negligence but not proximate cause.

Slight negligence which is a proximate cause may be a defense, but negligence which is a slight cause is not a defense. The vital distinction between these two rules is set forth in a comment note at 114 A.L.R. 830, the title of which is "The doctrine of comparative negligence and its relation to the doctrine of contributory negligence," wherein it is stated as follows:

"While the contributory negligence of the plaintiff, however slight, will defeat his right to recover, if it was the proximate or the concurrent cause of his injury, it will not defeat that recovery if it merely remotely caused or contributed to the injury."

The law is clear that contributory negligence of plaintiff, however slight, will defeat recovery; and also that negligence must be a proximate and not a remote cause of the plaintiff's injuries to defeat recovery. To say that this causal relation may be sufficient, however slight, or which contributes in any extent or in any degree, is to permit negligence remotely causing or slightly affecting injury to defeat recovery. The instruction requested by the defendants and given by the court in this case sets forth this latter rule and, hence, the instruction was prejudicially erroneous.

Where plaintiff's contributory negligence is a remote cause, it does not preclude recovery. See *Am. Jur.* 896, Negligence, Section 212. In 65 C.J.S. 742,

Section 129, the necessity of the existence of proximate cause is thus stated.

“It is not sufficient that the negligence for which plaintiff is responsible contributed to cause the injury complained of. In order to be contributory negligence, such negligence must be a proximate cause of the injury. It must be proximate to the injury in the same sense in which defendant’s negligent act or omission must have been proximate to the injury in order to give a right of action.

“The necessity of proximate causation between the negligence for which plaintiff is responsible and the injury of which he complains has been expressed in various ways. Thus, it has been said that no negligence is contributory unless it contributes ‘substantially,’ or ‘essentially,’ or ‘materially,’ or ‘directly,’ or ‘materially and essentially,’ as well as ‘directly,’ to the injury; and it must be one of the ‘direct,’ ‘producing’ or ‘efficient’ causes of the injury, ‘part of the efficient cause,’ or a cause ‘without which the injury would not have occurred.’ The use of these and similar expressions to distinguish the proximate from the remote cause of the injury have been held to be neither erroneous or misleading, but at least one court has taken the contrary view with respect to the terms ‘material’ and ‘efficient.’ ”

The modern tendency is not to use the words direct, material, or efficient in defining proximate cause, but rather as is stated in the *Restatement of the Law of*

Torts, Section 431, the contributing circumstance must be a substantial factor in the chain of causation. The Utah Supreme Court in the case of *Coray v. Southern Pacific Company*, 112 Utah 166, 185 P. 2d. 935, discussing the question of proximate cause quoted from the *Restatement of the Law of Torts*, Section 431, comment (a) as follows:

“The negligence must also be a substantial factor as well as an actual factor in bringing about the plaintiff’s harm. The word ‘substantial’ is used to denote the fact that the defendant’s conduct has such an effect in producing the harm as to lead reasonable men to regard it as a cause, using that word in the proper sense in which there always lurks the idea of responsibility, rather than in the so-called ‘philosophic sense,’ which includes every one of the great number of events without which any happening would have occurred. Each of these events is a cause in the so-called ‘philosophic sense,’ yet the effect of many of them is so insignificant that no ordinary mind would think of them as causes.”

Also, see *Cox v. Thompson* 254 P. 2d. 1947, 1051, which applies the substantial factor test.

The substantial factor test in determining proximate cause is applied the same whether determining negligence or contributory negligence. Section 465, *Restatement of Torts*, states as follows:

“The plaintiff’s negligent exposure of him-

self to danger or his failure to exercise reasonable care for his own protection is a legally contributing cause of his harm if, but only if, it is a *substantial factor* in bringing about his harm and there is no rule restricting his responsibility because of the manner in which his conduct contributed to his arm." (Emphasis added)

There is a considerable difference between a definition which states that it must be a substantial factor as contrasted with the instructions given in this case where it is stated that any act on the part of the plaintiffs "which in any degree contributed to the happening of his accident" or "which in any degree proximately contributed to the happening of the collision" or "such negligence proximately contributes to any extent, however slight, to produce their injury."

In *Rush v. Lagomarsino*, 237 P. 1067, 196 Cal. 308, the court discussed instruction of a similar nature and stated as follows:

"(3) The trial court further erred in the same instruction when it charged the jury that any fault or negligence on the part of the plaintiff, '*which may in any wise have contributed to the accident,*' would preclude a recovery by the plaintiff. The vice of this instruction is that it ignores the important qualification that, in order to defeat a recovery, the negligence of the plaintiff must have contributed proximately to the injury. *Fernandes v. Sacramento City Ry. Co.*, 52 Cal. 45. The error of this instruction was accentuated by the further charge of the trial court that:

‘When the negligence of the injured party contributed to the injury complained of the law will afford no redress, and if, therefore, you find in this case that plaintiff was negligent and such negligence contributed to the injury complained of, I instruct you that the plaintiff cannot recover against the defendant.’

“The negligent act or omission of a plaintiff which will exculpate a defendant from responding to the plaintiff in damages resulting from the plaintiff’s negligent act or omission must be a contributing, proximate cause of the damages.***

“While it is true that the trial court, prior to the giving of the instructions immediately under consideration, gave a definition of contributory negligence which included the element of proximate cause, nevertheless, the instructions complained of were so specifically and emphatically at variance with the requirements of the rule relating to contributory negligence that there is, we think, no escape from the conclusion that they must have confused and misled the jury to the prejudice of the plaintiff.” (Emphasis added)

In *Rainer Heat & Power Company v. City of Seattle*, 193 P. 233, 236, 113 Wash. 95, the court stated as follows:

“It is contended in behalf of the appellant that the trial court erred in its instruction to jury as follows:

‘If the plaintiff was guilty of any act of negligence alleged against it in the answer of the defendant city, *which contributed in*

any manner to the damages to said heating plant for which plaintiff sues, it is your duty to deny the plaintiff the right to recover any damages to said heating plant.'

"We have italicized the words to be particularly noticed. The instruction, we think is erroneous under the decisions of this court in *Spurrier v. Front Street Cable Ry. Co.*, 3 Wash. 659, 29 Pac. 346, *Cowie v. Seattle*, 22 Wash. 659, 62 Pac. 121, and *Atherton v. Tacoma Ry. & Power Co.*, 30 Wash. 395, 71 Pac. 39; the instruction putting upon the appellant a higher degree of care than the law burdens it with. Appellant's contributory negligence may not have been the proximate cause of the damage, and still it might have been a slight condition contributing to the damage in some manner. If its negligence contributed only in such small degree, such negligence would not prevent recovery."

In *Di Nucci v. Hager*, 184 Or. 555, 200 P. 2d 380, a verdict was rendered in favor of defendant and thereafter the trial court granted a motion for new trial. On appeal this latter order was affirmed. The court had given an instruction similar to the one set forth in this point and held that the giving thereof was error and stated:

"In instructing the jury, however, that if they found that plaintiff was proceeding at a speed which was greater than that provided for by the basic rule, and if such negligence was the cause of, *or contributed in the slightest degree to*

the proximate cause of the accident, then their verdict must be for the defendant, we think error was committed that necessitated setting aside the verdict rendered by the jury in favor of the defendant.” (Emphasis added)

The Utah Supreme Court recently had occasion to consider a similar instruction in the case of *Johnson v. Lewis et al*, 240 P. 2d. 498. However, in that case the words “which in any manner, however slight,” modified the conduct of the party rather than proximate cause. The instruction specifically stated in part as follows:

“Contributory negligence is an act or omission of the plaintiff which in any manner, however slight, proximately contributed to cause the injury or damage of which he complains.”

The court properly construed the instruction to the effect that the word “which in any manner, however slight,” modified the preceding words “act” or “omission” and held, according to the distinction heretofore discussed, that slight negligence may be sufficient as a defense while slight causation would not be sufficient. The court in discussing the above mentioned instruction stated as follows:

“The jury was told that contributory negligence is ‘any act or omission of the plaintiff *which in any manner, however slight*, proximately contributed to cause the injury.’ The phrase ‘which in any manner, however slight,’ is probably

technically correct and would do no harm if the jury, in spite of it, kept in mind that there must be a negligent act, that is, an act which lacks ordinary care; and that such act must proximately contribute to cause the injury, that is, it must, as a natural and continual sequence unbroken by any new or intervening cause produce the injury complained of. But it seems hard to reconcile an act which has those causal qualities as being one which 'in any manner, however slight,' causes or even proximately contributes to cause the injury. In other words, it seems in order for an act to constitute negligence and proximately contribute to the causing of an injury it would have to be an effective cause thereof and not merely a slight cause of such injury. This phrase is calculated to belittle the causal relationship necessary between the contributory negligence of the plaintiff and the accident and tends to induce the jury to forget that such contributory negligence must be the result of a negligent act, and a contributing proximate cause of the injury and therefore tends to confuse rather than enlighten the jury on that problem.

"This tendency would not be so objectionable if the same type of phrase were used in describing the causal relationship required between the defendant's negligence and the accident or injury. But no such phrase was used in instructing on defendant's negligence."

In this case as in the Johnson case no such instruc-

tion was given in defining negligence and proximate cause as to the defendants.

Instructions No. 4 and 6 in the present case clearly used the phrase under discussion to modify proximate cause rather than negligent conduct. In Instruction No. 4 it was stated "contributory negligence which in any degree contributed to the happening of this accident." In Instruction No. 6 it was stated "contributory negligence which in any degree proximately contributed to the happening of the collision" **** "and if such negligence proximately contributes to any extent, however slight, to produce their injury, they cannot recover." It cannot therefore be argued in this case that the instruction is even technically correct and in view of the other instructions concerning contributory negligence, as herein discussed, the giving of such instructions could only constitute prejudicial error.

CONCLUSION

The instructions as a whole accentuated, emphasized and magnified the issue of contributory negligence. After generally mentioning the issue in the first three instructions the court, giving instructions requested by the defendants, repetitiously returned to the issue almost as if it was a chorus to be sung after each other instruction. Instructions No. 4, 6 and 8 in detail, generally and specifically, analyze, dissect and discuss contributory negligence. Instruction No. 5 applied equally

to all parties. Instructions No. 7 and 9 minimized, depreciated and belittled the duty of defendants. Instruction No. 10, as an anchor man, discussed unavoidable accident. Without more the layman jury must have felt compelled to return verdicts of no cause of action.

Factually, and based upon the pleadings, there was no justification to instruct the jury on an issue of contributory negligence of the plaintiffs, Miss Gusinda and Mrs. Devine. Not only were instructions requested and given on this issue, but the instructions themselves placed upon these plaintiffs a duty to see and to warn. Since these plaintiffs testified that they had not seen and did not have the opportunity to warn the driver, the instructions peremptorily directed the jury against these plaintiffs.

Even assuming the instructions were warranted on the issue of contributory negligence, the instructions as given were erroneous. Conduct that only contributes "to any degree" or "to any extent, however slight," to produce the injury does not satisfy the requirement of proximate cause which normally demands that chargeable conduct be a substantial factor in the limitless chain of causation.

In giving instructions requested by the defendants, the court committed prejudicial error. An error, though conscientiously made cannot be believed sincerely enough to make it any less an error. The plaintiffs suffered serious injuries as a result of a collision caused by the defendants. They should not be required to now suffer

serious injustice as a result of erroneous instructions requested by the defendants.

Respectfully submitted,

RICHARDS AND BIRD
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A copy of the foregoing Brief was mailed to Stewart, Cannon & Hanson and Ray, Quinney & Nebeker, attorneys for defendants, this 30th day of June, 1954.