

1955

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Utah Supreme Court

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Recommended Citation

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IN THE SUPREME COURT
of the
STATE OF UTAH

STEVEN L. WEST,

Plaintiff and Respondent,

— vs. —

MILES N. ANDERSON, HAL ANDERSON, CLYDE ANDERSON, MALCOLM N. McKINNON, doing business as AMERICAN FUEL COMPANY and CLYDE COX,

Defendants and Appellants.

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Case No.

5294

BRIEF OF DEFENDANTS AND APPELLANTS
MALCOLM N. McKINNON and CLYDE COX

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BRIEF OF DEFENDANTS AND APPELLANTS
MALCOLM N. McKINNON and CLYDE COX

NATURE OF THE CASE

On October 20, 1952 the defendant Hal Anderson drove a truck belonging to the defendants Miles N. Anderson and Clyde Anderson, co-partners, to the premises of a mine owned by the defendant Malcolm N. McKinnon, doing business as American Fuel Company, for a load of coal.

The coal was being loaded at the mine by the defendant Clyde Cox, an employee of the defendant Malcolm N. McKinnon. Hal Anderson placed the truck in a position to be loaded with coal upon terrain which, it was agreed, sloped downward at a grade of approximately 6 percent.

Clyde Cox, who was loading the trucks by means of a scoopmobile, had placed 3 or 4 tons of coal in the truck when it started in motion and rolled downgrade and upon and against Steven L. West, who was reclining against a coal pile near where the truck was being loaded. Steven West was an independent trucker who had come to the mine for a load of coal. The defendants Miles N. Anderson, Hal Anderson and Clyde Anderson were represented by Attorney Dilworth Woolley. The defendants Malcolm N. McKinnon, doing business as American Fuel Company, and Clyde Cox were represented at the trial by Rex J. Hanson of the firm of Stewart, Cannon and Hanson.

At the outset of the trial there was another defendant, Eastern Utah Development Company, who plaintiff claimed was the employee of Miles N. Anderson and Clyde Anderson. The evidence showed that under the contractual arrangement they were independent contractors. During the course of the trial the action was dismissed as to this defendant and it is not involved in this appeal.

It was the contention of the plaintiff that Hal Anderson was an employee of Miles Anderson and Clyde Anderson and that he negligently set the brakes of the truck he was driving, did not remain with the truck during the loading and that he negligently failed to place blocks under the wheels of the truck while it was being loaded. Plaintiff further contended that the defendant Hal Anderson was negligent in that he left his truck parked with the front wheels turned in a down hill direction. As to the defendant Clyde Cox, the plaintiff contended that he negligently loaded the truck in such a manner as to cause the same to move from a stationary position; that

is, such negligence on his part consisted of either bumping the truck with the scoopmobile or negligently dumping large loads of coal from a height of several feet into the bed of the truck; that he failed to ascertain that the truck was securely braked or blocked so that it would not roll forward while being loaded, and that he loaded the truck when it was unattended.

It was claimed that the foregoing acts of negligence on the part of the defendants caused the truck to roll down hill and run on to the plaintiff, who was reclining on the ground in the vicinity of where the truck was being loaded.

All of the defendants denied that they were negligent in the manner claimed and all of the defendants claimed that the plaintiff negligently caused or contributed to his own injuries by placing himself in a reclining position down hill and to the left of and in front of the truck which was being loaded and further by his inattention to the loading of said truck and failure to exercise due care for his own safety (R. 40-45).

The case was tried to a jury and submitted to the jury on a special verdict (R. 129-134). By reason of the jury's answers to the questions propounded, the court entered a judgment against the defendants for \$23,690.

It is the contention of the defendants Clyde Cox and Malcolm N. McKinnon in this appeal that the verdict and the judgment should be set aside as to these defendants for the reason that defendant Clyde Cox was not guilty of any negligence which was a proximate cause of the plaintiff's injury, the plaintiff himself was guilty of contributory negligence which was a proximate cause

of his own injury, and because the court in its instructions and special verdicts erroneously instructed the jury and submitted certain issues to the jury on which there was no evidence upon which a jury could have made a finding.

STATEMENT OF FACTS

The place where this accident occurred is located in Huntington Canyon in Emery County, Utah (R. 24) and what is generally called a "wagon mine"; one not having any railroad connection (R. 407). The area is generally illustrated by the photographs, Exhibits P-4, P-5, P-6, M-8 and M-9. The photos will show that it is a rather large, flat area between two canyon walls. The area is located near the bottom of the canyon at the entrance to the American Fuel Company property. There was a road extending through the property. On the south side of this road there was a pile of coal dust, referred to as "bug dust." On the north side of this road was a smaller area than that on which the pile of coal dust was located which dropped off into a stream running alongside the canyon wall. The ground at that point sloped from the area in which the pile of coal was found, generally down hill toward the stream and down the canyon at a grade which was agreed to be 6 percent (R. 40). A scoopmobile operated by Clyde R. Cox (See Exhibits 1, 2 and 3) was used to load coal into the trucks. The drivers of the trucks decided among themselves whose turn it was to be loaded (R. 178), and drove the particular truck into the area adjacent to the coal pile when it was his turn (R. 178). The bucket on the scoopmobile slides up and down on the rack at the front of the vehicle

(Exhibits 1, 2 and 3). With the bucket in a lowered position, the scoomobile is driven into the pile of coal until the bucket is full. The bucket is then raised high enough that it will clear the side of the truck to be loaded, at which point the scoomobile approaches the truck at right angles. The bucket is dumped into the truck, whereupon the scoomobile is backed off again and goes back to the pile of coal for another load.

The plaintiff Steven L. West testified that he left Salt Lake City, Utah around 2:00 o'clock A.M. on the day that the accident occurred, with a load of concrete to be unloaded in Price, Utah. Upon arriving there, he and two other fellows unloaded the concrete, after which he proceeded to the American Fuel Company mine in Huntington Canyon (R. 347). The trucks were loaded in rotation as they came up and the plaintiff had been waiting, according to his testimony, about a half hour for his turn at the time of the accident. He had stationed himself across the road and about 30 feet from where the trucks were being loaded, and was reclining on a pile of slack coal, with his hat over his eyes (R. 348) he was either dozing or in his words was "sitting there thinking of all his problems" (R. 349). He heard the trucks pulling in to be loaded and pulling out and was aware of what was going on, but was not watching or paying any particular attention (R. 349). The first intimation he had of the impending accident was an instant before the truck ran over him (R. 350). The witness Clyde Cox testified that the plaintiff was in the position indicated by the X on the right hand side of Exhibit P-5, and that the truck



which was being loaded was in the position of the X with the T by it, on the left hand side of Exhibit P-5 (R. 182). Referring to Exhibit P-4, which is reproduced herein for the convenience of the court, he testified that the plaintiff was in the position of the X near where the man in that photograph is standing and that the truck which was being loaded was in the position of the X and the T near the pile of coal with the front of the truck pointing in the direction of the arrow, which would be down the canyon. The scoopmobile was located in the position shown by the S on Exhibit P-4. He testified that in this position the plaintiff was 40 to 50 feet from where the trucks were being loaded, and at the time of the accident was lying down (R. 185); that the plaintiff

had his hat down over his face and looked as if he were asleep (R. 204).

The witness Hal Anderson testified that on Oct. 20, 1952 he had driven an International truck belonging to his brother or his dad, Miles Anderson and Clyde Anderson, respectively, up Huntington Canyon to the American Fuel Company property (R. 247). He drove up to the tipple where he was told, "They are loading dust today," so he drove to the dust pile further down the road. He parked his truck on the left hand side of the road and waited 15 or 20 minutes (R. 250). During that time he talked to a number of other truckers and observed the plaintiff lying in the position where he was later hurt (R. 249). When it came his turn he drove onto the road and backed alongside the coal pile (R. 251). He parked the truck right on the road or pretty close to the road, with the wheels turned to the left and facing down canyon, on an incline. He then put the brakes on and placed the vehicle in first gear, after which he got out of the truck and walked down to talk to his brother Clyde Anderson, who was driving another truck and was also waiting to be loaded. Clyde Anderson's truck was parked a short distance further down the canyon from where the witness had left his truck. He had observed Clyde Cox put the first scoop load of coal into his truck, but was not paying much attention and did not see him put any more coal in the truck (R. 256). He had been talking to his brother (R. 257) when he heard someone yell, "Your truck is moving!" He turned and started to run after it. The front end of the truck when he first saw it was already

across the road (R. 257). He crossed in front (R. 285) and to the left hand side of the truck. Just as he got to the left door, it stopped of its own accord. At that point Clyde Cox said, "There is a man under your truck," and they started digging him out (R. 262).

He testified that while he was still at the scene of the accident before the coal had been dumped out of the truck, the emergency brake was tested by letting the truck coast off a steep grade up canyon and pulling the emergency brake on, which caused the rear wheels to slide (R. 263). The defendant Clyde Cox testified that after Hal Anderson had parked his truck, he got out of it and walked 30 to 40 feet down the canyon from where he was loading to where Mr. Anderson's brother was (see the black cross on Exhibit P-5, marked "XCA" (R. 191). He had put 2 or 3 loads into the truck during which time he had noted no movement on the part of the truck other than settling on its springs as it took the load (R. 184). After putting in the last or third load, the witness backed the scoopmobile in a circle approximately 10 feet behind where the truck had been standing (R. 205) and was in the process of shifting to go forward for another scoop load, when he observed that the truck was moving (R. 184). At that time the truck was about 30 feet from him. He called to the plaintiff, "Look out, Steve!" (R. 184) and observed the truck roll to where the plaintiff Steve West had been lying (R. 208). He shut off the motor of the scoop and went over to where the truck was at that time unaware that the accident had happened. Not seeing the plaintiff around anywhere, he concluded that he

must be under the truck. He and Clyde Anderson grabbed shovels and dug as fast as they could to get the plaintiff out from under the truck, after which plaintiff was taken by ambulance to the Price City Hospital (R. 206).

Cox further testified that he did not bump the truck during the process of loading it (R. 195). The coal was dumped into the truck when the bucket was approximately a foot above the side of the truck bed. He testified that he had been loading trucks in this same manner for about 2 years, during which time he had never observed a truck roll free (R. 202). He further testified that it was the custom of the truckers to remain near the truck during the process of loading although because of the dust they usually left the cab; that they would get on top of the truck after he had them partially loaded and straighten the coal around so that they could get as much weight on the truck as possible (R. 203).

Clyde Anderson testified that on the day of the accident, he was at the American Fuel Company mine (R. 482) waiting to be loaded (R. 487); that he was parked down hill or down the canyon from where the scoopmobile was operating (R. 458) talking to his brother Hal (R. 453). He had observed the truck being parked and had observed Clyde Cox put one scoop of coal in the truck. He was not, however, watching the truck at the time it started to move. Hal had hollered that his truck was moving and when he observed the truck at that time, it was almost to where Steve was lying (R. 453).

The coal from the American Fuel Company mine was being hauled under a contract with the Eastern

Utah Development Company of which company Mr. Max Fawcett is the manager (R. 373-4) under an arrangement whereby the court determined the Andersons were independent contractors.

On December 30 or 31, 1953 the truck which had been involved in this accident was reassembled and put in the same condition that it was on the day of the accident (R. 467), it was then taken to the premises of the American Fuel Company. Hal Anderson, Clyde Anderson, Rex Hanson, a photographer, Frank Stauffer, a deputy sheriff and Clyde Cox were present (R. 467-9). Hal Anderson parked the truck in the exact spot where it had been parked on the day of the accident. He put the truck in first gear and pulled the emergency brake on tight, as he testified he had done on the day of the accident. The truck was then examined by Max Fawcett and by Deputy Sheriff Frank Stauffer to make certain that the truck was in gear and the brakes were on. Clyde Cox then took the same scoopmobile and put a load of coal in the truck in the same manner from the same position as on the day the accident occurred (R. 470). Mr. Cox then reloaded the scoopmobile and was advised this time to bump the truck as hard as he could without endangering himself, which was done. On the third load, he raised the scoopmobile bucket to its extreme height and completely dropped the entire amount of coal from the bucket into the truck from that distance. The truck bounced up and down and shook, but did not move forward. Cox then reloaded the scoopmobile, drove it around behind the truck and did his best to try to push the truck forward

down the canyon. The wheels did not turn, but did slide forward some 14 to 16 inches. A movie of this experiment was taken and introduced into evidence (Exhibit M21).

The plaintiff testified as part of the evidence on damages that during the year 1951 he made around \$2,-400 prospecting and hauling coal (R. 336-7), and that during the year 1952 he made around \$2,600 (R. 337); that at the time of the accident, he was earning \$300 per month, with withholding tax taken out (R. 345). This was the only evidence on his loss of earning capacity.

STATEMENT OF POINTS

POINT I. THE DEFENDANTS MALCOLM N. McKINNON AND CLYDE COX WERE NOT GUILTY OF ANY NEGLIGENCE WHICH WAS A PROXIMATE CAUSE OF THE INJURY TO THE PLAINTIFF.

POINT II. PLAINTIFF WAS HIMSELF GUILTY OF CONTRIBUTORY NEGLIGENCE WHICH WAS A PROXIMATE CAUSE OF HIS OWN INJURY.

POINT III. THE COURT ERRED IN ITS INSTRUCTIONS AND IN SUBMITTING ISSUES TO THE JURY WHICH WERE NOT SUPPORTED BY THE EVIDENCE AND OVER-ACCENTUATED PLAINTIFF'S THEORY.

ARGUMENT

POINT I. THE DEFENDANTS MALCOLM N. McKINNON AND CLYDE COX WERE NOT GUILTY OF ANY NEGLIGENCE WHICH WAS A PROXIMATE CAUSE OF THE INJURY TO THE PLAINTIFF.

At the close of the evidence, defendants Malcolm N. McKinnon and Clyde Cox moved for a directed verdict upon the grounds that no act or conduct on the part of Clyde Cox could have been a legal proximate cause of the accident; that the evidence conclusively showed that

if the brakes on the truck had been set or the vehicle placed in proper gear that the loading operation would not have caused it to roll forward, upon the further ground that Clyde Cox was entitled to assume until it reasonably appeared to the contrary that the truck would be left with its brakes fully applied and in proper gear before he commenced to load it, that there was nothing to put him on notice to the contrary in the evidence. The motion was taken under advisement by the court and among other issues, the court submitted to the jury the issues of whether Clyde Cox was negligent in:

(a) bumping the truck with the scoopmobile;

(b) in dumping large loads of coal into the truck from a height greater than that which a reasonably prudent person would have used under the existing circumstances;

(c) in failing to ascertain that the dump truck was so securely braked or blocked that it would not roll down hill while being loaded; and

(d) in proceeding to load the dump truck while it was unattended.

The jury absolved Clyde Cox of negligence under (a) and (b) but found that he was negligent in (c) and (d), but on the latter issue found that his negligence was not a proximate cause of the accident (R. 495-6). As a result of the jury's findings, the only issue raised by the defendants' motion for a directed verdict is: was there sufficient evidence to go to the jury on the issue of whether Clyde Cox was negligent by "failing to as-

certain that the dump truck was so securely braked or the wheels blocked, before starting to load it; and was he required to foresee that if this was not done, the truck would roll down hill and against and upon the plaintiff?

There was no evidence at the trial that Clyde Cox exercised any supervision or control over the operation of the truck.

In determining whether Clyde Cox was negligent under the circumstances, it should be kept in mind that the motion picture submitted in evidence showed conclusively that if the truck was properly braked, it would not roll forward because of the force connected with or resulting from the loading operation. The court will recall that Clyde Cox testified and the motion pictures verified when the experiment was made that he was instructed to hit the side of the truck with the scoopmobile with as much force as possible without jeopardizing the equipment or his own safety, and that after 3 scoops of coal had been dumped into the truck, he attempted to push the truck down hill with the scoopmobile but was unable to do more than skid the truck's rear wheels, which showed that failure to block the wheels had nothing to do with causing the accident, that no action on the part of Clyde Cox caused the truck to roll down the hill, and the jury so found in their answers to the interrogatories.

If nothing Clyde Cox did caused the truck to roll, and he did not supervise the mechanical operation of the truck, would he have any more duty to ascertain if the truck was securely braked or the wheels blocked than any other person who happened to be in the vicinity?

If Stephen West could assume the truck was securely braked, was not Clyde Cox entitled to the same assumption?

The evidence was also undisputed that Clyde Cox was employed solely as a handyman on the premises. One of his duties was to operate the scoopmobile. He was not familiar with the mechanism of this truck or the various types of trucks whose owners drove them onto the premises to purchase coal. Inasmuch as most of the drivers owned their own trucks, they were anxious to get loaded and be on their way as soon as possible. The custom was to load the trucks in the order in which they arrived. The evidence showed that the braking mechanism and gear ratio of modern day trucks are complicated and, of course, the average person in observing the truck would not know whether it was partially or securely braked. Cox was unfamiliar with the truck's mechanism.

The truck involved in this accident was equipped with an Eaton two-speed, rear axle, the safe operation of which required the truck to be parked in low gear range on a down grade, because if left in high range, after the vacuum part of the mechanism had become equalized, a spring would attempt to pull the gear from high range to low range, and if the cogs on the gears happened to be on dead center so that the gears could not mesh, there was nothing to prevent the truck from moving forward in free wheeling as the emergency brake or transmission gear would then have no effect on the movement of the truck's rear wheels. Was it unreason-

able for Clyde Cox to assume that the drivers of the trucks; in this case, Hal Anderson's concern for the safety of the truck, would not result in his taking the necessary precautions to see that the truck was in good mechanical condition and that the brakes were properly set? Even if he had climbed down off his scoopmobile, walked over to the truck and looked inside the cab, he would not have known whether the truck was properly parked in low gear range. Was Clyde Cox in his capacity required to anticipate not only that Hal Anderson had not properly braked the truck, but also that Stephen West would be so inattentive as to be injured if the truck rolled forward? The evidence showed that the truck was somewhere between 30 and 50 feet from the plaintiff. By moving to either side, he could have avoided this accident if he had observed the truck start to roll toward him. If West was entitled to assume that the truck was properly braked, and he must have done so, as he had his hat over his eyes and apparently was either oblivious or unconcerned about the fact that the truck was pointed in his direction while being loaded, was not Clyde Cox entitled to the same assumption?

The defendants were not insurers of the safety of those who might come to their premises for coal. Their duty was only to exercise reasonable and ordinary care under the circumstances. The general rule is stated by our Supreme Court in the case of *Quinn v. Gas & Coke Company*, 42 Utah 113, 129 P. 362, as follows:

“What legal duty did appellant owe respondent as one of its customers? It was the duty to exercise ordinary care and diligence to provide

and maintain a reasonably safe place for ingress and egress to and from its place of business for its customers, and to exercise the same degree of care and diligence to prevent injury to them and to their property while they were lawfully in its place of business or on its premises. Appellant, however, was not an insurer of the safety of its customer; nor was it required to avoid all accidents, either to them or their property, at its peril. The respondent, therefore, was required to show that appellant in some way had omitted to exercise that degree of care and diligence for her safety stated above, and that by reason of such want of care her dress was injured as alleged....”

The duty of the owner of the premises toward an invitee arises from his superior knowledge of the premises and where, as in this case, the danger inherent in a situation, if any, is as obvious to the invitee as it is to the owner of the premises, the owner has no duty to warn the invitee. In the case of *Austin v. Riverside Portland Cement Co.*, (Cal.) 271 P2 943, an action was brought for injuries sustained by contractor’s employees who received electrical shocks when contractor’s crane came into contact with overhead power line on defendant cement company’s premises. The court held that the evidence on issues of whether defendant had had superior knowledge of the dangerous condition or had failed to exercise ordinary care in providing a safe place to work did not support a finding that the defendant had breached its duty to plaintiffs. The court said:

“The general rules as to the duty owed by an owner of land to an invitee thereon are well set-

tled. He owes a duty to have his premises in a reasonably safe condition, and to give warning of latent or concealed perils which are known to him and not to the other. The owner is not an insurer as to such an invitee and the true ground of his liability, if any, is his superior knowledge of the perilous condition and the resulting danger to the invitee. The owner is required to use ordinary care for the safety of the invitee and to give warning of a danger attendant upon the work which the person invited is to do thereon if such danger arises from causes or conditions which are not readily apparent to the eye. Usually, he is not required to give the invitee notice of warning of an obvious danger."

The evidence shows that in the two years Clyde Cox had been loading coal, at the mine of the American Fuel Company, that this was the first time that a truck had ever moved from its moorings and rolled down hill. Under such circumstances, the defendant had no duty to anticipate such would be the case in this instance. As stated in the Restatement of the Law of Torts, Negligence, sub-section (e), page 817:

"As stated in Section 290, comments (f) to (h), the actor is required to recognize the fact that a certain number of animals and human beings may act in a way which is not customary in the great mass thereof, and that there are occasional exhibitions of the operation of natural forces which are radically different from the normal. It would, however, be impractical to set a standard of behavior so high as to require every man under all circumstances to take into account the chances of these exceptional actions and operations. Therefore, except where the actor has

reason to expect the contrary, he is entitled to assume that human beings and animals will act and that natural forces will operate in their usual manner, unless their exception or action or operation would create a serious chance of grave harm to some valuable interest and there is little utility in the actor's conduct. Thus, a motorist approaching an intersection of two highways, is entitled to assume that the other motorists on the intersection highways will observe the rules of the road, since motor traffic would be unreasonably delayed unless motorists were permitted to act on such assumptions. On the other hand, a motorist approaching a railroad crossing is not entitled to assume that the railroad company will comply with its duties to blow the whistles and ring the bell, but is required to take very great precautions to look out for trains, which have not given such notice of their approach."

In *Martin v. Stevens* (Utah) 243 P2 747, where it was argued that a driver was negligent in entering an intersection upon the assumption the other driver would yield the right of way, it was said at page 751 of the Pacific Reporter:

"... He was not obligated to anticipate either that other drivers would drive negligently, or would fail to accord him his right of way, until in the exercise of due care, he observed, or should have observed, something to warn him that the other driver was driving negligently, or would fail to accord him his right of way. If this principle is not clear in the earlier cases, it is firmly established by the more recent expressions of this court."

The rule announced in *Hilliard v. Utah By-Products*

Company, 1 Utah (2) 287, 263 P(2) 287, is particularly applicable to the evidence in this case, not only as to whether Clyde Cox should have foreseen the negligent conduct on the part of Hal Anderson in parking the truck, but also as to his duty to foresee that the plaintiff would not exercise reasonable care for his own safety:

“In applying the test of foreseeability to situations where a negligently created pre-existing condition combines with a later act of negligence causing an injury, the courts have drawn a clear-cut distinction between two classes of cases. The first is where one has negligently created a dangerous condition (such as parking a truck) and a later actor observed, or circumstances are such that he could not fail to observe, but negligently failed to avoid it. The second situation involves conduct of a later intervening actor who failed to observe the dangerous condition until it was too late to avoid it. In regard to the first situation, it is held as a matter of law that the latter intervening act does interrupt the natural sequence of events and cuts off the legal effect of the negligence of the initial actor. *This is based upon the reasoning that it is not reasonably to be foreseen nor expected that one who actually becomes cognizant of a dangerous condition in ample time to avoid injury will fail to do so.* On the other hand, with respect to the second situation, where the second actor fails to see the danger in time to avoid it, it is held that a jury question exists based on the rational that it can be reasonably anticipated that circumstances may arise wherein others may not observe the dangerous condition until too late to avoid it. The distinction is basically one between a situation in which the second actor has sufficient time, after being

charged with knowledge of the hazard, to avoid it and one in which the second actor negligently becomes confronted with an emergency situation."

So say we here, until reasonably put on notice to the contrary, Cox was entitled to assume that Hal Anderson would use reasonable care in parking a truck which was in a reasonably safe mechanical condition.

In the case of *Mehl v. Carter*, 237 P2 240 (Kan.), an action was brought to recover damages to realty caused by a fire which started in a building owned by the defendant. The evidence showed that the defendant kept gasoline on the premises in violation of certain city ordinances. The evidence further showed that the receptacle containing the gasoline was knocked over by persons having no connection with the defendant, the gas becoming ignited and causing the fire and resulting damage. The jury returned a verdict for the defendant and the appellants contended that the defendant was liable as a matter of law. Upon the question of whether he should have foreseen the fire, the court said:

"Of course, a person cannot without liability create a condition which, in the exercise of reasonable care, should cause him to realize that injury is probable or likely to occur but a person is not liable for a consequence which is merely possible but not likely to occur. Stated in another way, one is bound to anticipate and provide against that which usually happens or is likely to happen but it would impose too heavy a burden to be held responsible for guarding against what is unusual or unlikely to happen and what has been said to be only remotely or slightly probable. (Citations given) Had appellee's employees

knocked the can off the bench in the course of his duties a different question would be presented with respect to what appellee reasonably should have anticipated. But that is not this law suit. We think we would not be justified in concluding as a matter of law that appellee, in the exercise of reasonable care should have anticipated the danger of some outsider going behind a work bench and there disturbing tools or equipment located at the rear of such a bench. Surely appellee was not obligated, as a matter of law, to anticipate a scuffle by outsiders would be probable or was likely to occur at such a place”

“In the Rowell case, *supra*, 162 Kan. 294, 176 P2 592, it was held: ‘Natural and probable consequences are those which human foresight can anticipate because they happen so frequently they may be expected to recur.’ ”

In this case, any act of the defendants Malcolm N. McKinnon and Clyde Cox was twice removed from the injury to the plaintiff. Not only do we have the intervening negligence of the defendant Hal Anderson, but we also have the conduct of the plaintiff in stationing himself in a position of peril in front of the defendant Hal Anderson’s truck, oblivious to what was going on around him. Considering the experience of the defendant — that during the 2 years that Clyde Cox had been loading trucks in the past, no truck had ever rolled forward while being loaded and that it was not the practice to block the wheels — the finding of the jury that the defendant Clyde Cox was negligent goes beyond the limits of what might reasonably be foreseen by him and makes the defendants insurers of the safety of every

person who might choose to enter upon the premises of the defendants.

POINT II. PLAINTIFF WAS HIMSELF GUILTY OF CONTRIBUTORY NEGLIGENCE WHICH WAS A PROXIMATE CAUSE OF HIS OWN INJURY.

The evidence was that the plaintiff placed himself in a position down hill and slightly off to the other side of the road from the point where the trucks were being loaded and then proceeded to ignore the activities which were going on, although he was aware that trucks were being loaded and moving in and out of the area all the time. Had he either selected a safer spot in which to recline or been attentive to the activity which was going on around him, he could have avoided this accident almost up to the very second in which it happened. The truck was moving slowly. Hal Anderson testified he had time to run in front of it before the forward momentum stopped (R 285).

Plaintiff claims that the defendants should have been aware of the dangers inherent in this situation and taken precautions to protect the plaintiff, while contending that plaintiff, who was himself aware of the same situation, should be absolved for ignoring the perils inherent in the situation.

The rule announced in *Hooten et al v. City of Burley* (Ida.), 219 P2 651, is particularly applicable to this case. In that case, the defendant, a municipal corporation, disconnected 2 lead wires from a pole on the west side of a street, and coiled them up and hung them in a small tree so that a Mr. Aldrich and the person for whose

death this action was brought could remove some trees from the premises of a man named Carson. At the time the wires were disconnected, the current in the wires was turned off, but it was turned on by an automatic time switch about 5:15 p.m. of the same day. The deceased, noticing that the wires were flashing and emitting sparks, was seen near the wires and then later found on the ground with one of the coils of wire around his body. No one actually saw him touch the wires. The court relying on the presumption that the deceased exercised due care for his own safety held that under the evidence whether or not he was contributorily negligent was a question for the jury. In so doing, however, they announced the following rules of law, which we believe are applicable to this case:

“It is a general rule of law that if one knows of the danger brought about by the negligence of another, and understands and appreciates the risk therefrom, and voluntarily exposes himself to such danger, he is precluded from recovering for resulting injuries.

“Further where one claiming damages for personal injuries contributes to the injury by want of ordinary care by placing himself in the dangerous position where he might be injured, and does not exercise ordinary care in preventing injury to himself after being placed in such a position, then the mere fact that another was negligent would not relieve the one injured from the effects of his contributory negligence, and if the person injured could have avoided such circumstances by the exercise of reasonable care and prudence, then no recovery can be had. . .”

In Restatement of the Law, Torts, Section 340, Page 927, it is said:

“A possessor of land is not subject to liability to his licensees, whether business visitors or gratuitous licensees, for bodily harm caused to them by any dangerous condition thereon, whether natural or artificial, if they know of the condition and realize the risk involved therein.”

In *Murray v. Ralph D'Oench Co.* (Mo.), 147 SW2 623, 13 Negligence Cases 638, the plaintiff, a woman 72 years of age, went to a beauty parlor and when she arrived she was informed by the attendants that they were cleaning up a spot on the floor. The janitor employed by defendant testified that he cleaned the beauty parlor every morning before any customers arrived and that as he was finishing up he was asked to try to remove a stain on the floor. One of the attendants sprinkled some cleaning powder on the floor and rubbed it with his mop. He mopped the spot with the wet mop and intended to do so with the dry mop but was prevented from doing so because customers were due. Plaintiff testified that she saw the damp spot when it was pointed out upon her entrance. The defendant appealed from a judgment for the plaintiff and the court used this language:

“We have held that the true ground of liability (of an owner or occupant of lands to an invitee) is the proprietor's superior knowledge of an unsafe condition and its dangers. We have, therefore, ruled, where the condition is so open and obvious that it is as apparent to the invitee as to the owner or where the condition is actually known to the invitee, that there is no liability;

otherwise, the proprietor would be in effect an insurer."

In *Kitchen v. Women's City Club* (Mass.) 166 NE 554, the facts were that the defendant, a Club organized to establish acquaintance among women and to provide a club house where members might meet informally, maintained such a house in Boston; the plaintiff and three other women were received as guests at the club house. The floor of the club house was of hard wood and was *highly polished*. While in her room she heard a knock at the door and started for the door and slipped on the middle of the rug, which was pushed against the mantle, and the plaintiff was thrown to the floor whereby she sustained injuries. A motion for directed verdict was granted. Says the court:

"That the defendant owed a duty to its paying guests to use reasonable care that the premises as a whole, and the rooms assigned to the use of the guests in particular, should be reasonably fit and safe for such use is obvious. And it is plain that it is its duty to take fair and reasonable precautions that the guest is informed and warned against all damages incident to the enjoyment of club privileges, *which are not obvious* to the senses of an ordinarily intelligent person. As a corollary, it follows that *no duty is owed to a guest, where the conditions are open and obvious to an ordinarily intelligent person*, to make changes in such conditions or call attention to dangers which are apparent to the senses of such a person. If the law is applied to the facts of this case, the verdicts were directed rightly. The plaintiff knew all the conditions of which she complains, she knew that light rugs when stepped on may be expected to

slip on slippery floors, but she did not anticipate that the rug in the room in question would slip on the floor of that room. She appreciated and voluntarily assumed the risk of any accident which naturally attached to the condition she observed, and by assenting negatived the existence of any duty on the part of the defendant to warn her of such dangers . . . We are of the opinion the plaintiffs have no right of action for the causes alleged in their pleadings or for any cause which the testimony would support."

A business invitee has a duty to exercise reasonable care for his own protection. In the case of *Knox v. Snow*, (Utah) 229 P2 874, the plaintiff went upon the premises of defendant, a service station operator, for the purpose of purchasing a tire for his car. The defendant informed him that he did not have a tire but might have an interliner suitable for the plaintiff's purposes. The plaintiff observed through the door of the sales room out in the repair shop at the far end of the shop there was an interliner which he thought would be suitable. At that point, without any directions from Allen, he proceeded toward the tire racks and was injured when he fell into a grease rack. The court said:

" . . . For the purpose of this case, we shall assume plaintiff was an invited business visitor when he entered and while he was in the work room. In spite of this assumption, we have great doubts as to whether the evidence establishes negligence on the part of the defendants. However, we pass that question and affirm the judgment because plaintiff was guilty of contributory negligence as a matter of law."

The general rule regarding contributory negligence is stated on page 861 of 38 Am. Jur., as follows:

“It is said that when the defense of contributory negligence is urged as ground for a nonsuit, it must appear that reasonable men, acting as the triers of the fact, would find, without any reasonable probability of differing in their views, either that the plaintiff knew and appreciated the danger, or that ordinarily prudent men under the same circumstances would readily acquire such knowledge and appreciation. As it generally is expressed, a plaintiff will not be held to have been guilty of contributory negligence if it appears that he had no knowledge or means of knowledge of the danger. . . .”

In this instance, the plaintiff had, or under the circumstances should have had, the same knowledge of the situation or any danger to himself arising from the position of the truck as did the defendant Clyde Cox. The probability of the truck rolling forward if not properly braked was obvious to anyone in the vicinity. He had within his power the means of preventing his own injury by the simple precaution of moving to a spot of greater safety. Had he looked, by moving a few feet to either side, he could have avoided the truck after it started to move. By voluntarily placing himself in a position of danger and continuing to remain therein, he assumed any risk inherent to the situation and should be precluded from recovery by reason of his own contributory negligence.

In *Wold v. Ogden City et al* (Utah) 258 P2 453, the plaintiff brought action against the city and a construc-

tion company for injuries sustained when plaintiff fell into a ditch which had been dug in the street in front of his house. The trial court dismissed the action and this Honorable Court upheld the dismissal on the grounds that the plaintiff was guilty of contributory negligence and had assumed a known risk, and was, therefore, precluded as a matter of law from recovering against the city or contractor for his injury.

The facts were that the plaintiff, in the afternoon, had observed a trench 4 feet deep and 2½ feet wide dug in the street in front of his home. Upon coming home with his wife late at night and in order to avoid walking one-half block to either end of the trench, he straddled the trench at a very dark place in order to help his wife across, but fell in the trench when the wall gave way. The court said:

“Without discussing the matter of which grounds the trial court relied on in making its decision, we believe that he specifically based his decision either on contributory negligence, claimed as error by the appellant, or the doctrine of assumption of risk, no error was committed and therefore appellant was not deprived of any constitutional right to a jury trial. . .

“Plaintiff admitted the hazardous condition in his complaint. Also in his brief when he said, ‘We have presented by the facts of this appeal a situation of appellant exposing himself to a known danger in order to exercise the right and privilege which he has to use the highways and streets.’ But such right and privilege are not without limitation and certainly cannot include the prerogative of use without the exercise of due care. It would

seem that a reasonable, prudent person would not expose himself to a known danger when there is an easy, known and convenient route around it. Plaintiff's conduct, aside from the concept of assumption of risk, was unreasonable in the light of this known hazard and the existence of a convenient, hardly burdensome detour at the intersection of Grant and Eighteenth Street, where the trench ended and through which plaintiff had driven shortly before his injury. To deliberately attempt to cross under such circumstances seems to be that type of lack of due care not attributable to the ordinarily prudent person exercising care for his own safety.

"Plaintiff also was precluded, having assumed the risk of injury under the circumstances of this case. We emphasize the fact that he knew of the hazard of 4:00 p.m. and at 2:30 a.m. when he 'looked the situation over.' The doctrine of assumption of risk, ordinarily applicable to an employer-employee relation, has been extended to some situations where one knows of a condition and concludes to accept its attendant hazards and acts accordingly without force or of necessity.

"Dean Prosser points up this principle as it applies to the instant case when he asserts that an objective standard must maintain, and that 'the plaintiff cannot be heard to say that he did not comprehend a risk which must have been obvious to him.' Further that 'as in the case of negligence there are certain risks which anyone of adult age must be taken to appreciate: the danger of slipping on ice, or falling through unguarded openings,' etc. He goes on to say that 'In the usual case, his knowledge and appreciation of danger will be a question for the jury; but where it is clear that any person of normal intelligence in

his position must have understood the danger, the issue must be decided by the court.'

"We think the facts of this case bring it within the principles announced, and it is no answer to say that plaintiff may not have known the bank of the trench would give way, since no adult person of ordinary intelligence, knowing of the trench, would take such chances on what counsel characterizes as being an 'extremely dark area, no lights, and in the middle of the night and in the shade of the trees,' where there was an easy and safe access to his home in a matter of minutes."

Nor can we absolve the plaintiff merely by reason of the fact that he failed to observe the dangers of his situation. In the case of *Scofield v. Sprouse-Reitz Company* (Utah) 265 P2 396, a salesman, calling upon the defendant's store manager, on office platform, mounted stairs which were adequately lighted but which were without a hand rail. In turning to go down the stairs, the salesman lost his balance and pitched over the side of the stairway. This court held that the salesman was guilty of negligence as a matter of law. After discussing the *Knox v. Snow* case, *supra*, the court said:

"The present case presents an even more obvious situation for contributory negligence than in the *Knox* case, for it does not require that we attribute to plaintiff knowledge of the particular type of place. He had ample opportunity to observe and, as a reasonably prudent man, should have looked to locate the hand rail before he attempted to put his weight on it. The light was sufficient, he knew that he was on a platform, and although he may have been preoccupied with try-

ing to make a sale, he must be held to take the simple precaution of a quick glance to assure himself of safety as would a reasonably prudent man. Likewise the store manager would have no reason to suspect that plaintiff had not observed the lack of a hand rail on his way up the stairs and would not feel it necessary to warn him as he started down the stairs of a condition which was obvious to all."

The verdict of the jury in this case places us on the horns of a dilemma by reason of its very inconsistency. They found that the defendant Hal Anderson was negligent in failing to set the brakes of the truck and in turning the front wheels of the truck in a down hill direction when parking the same, and that the defendant Clyde Cox was guilty of negligence in failing to ascertain that the truck was securely braked or blocked. None of these acts were negligent unless the probability of injury could be foreseen or should have been foreseen by the defendants. We must, therefore, introduce a third element into the picture, and that is the presence of the plaintiff in a position where he might be injured if the truck should roll down hill and turn to the left in rolling. What the jury has in effect said by its verdict is that the defendant Hal Anderson was negligent in failing to set the brakes of the truck and turning the front wheels of the truck in a down hill direction by reason of the fact that he should have foreseen that the truck might roll down hill and roll onto the plaintiff, and that the defendant Clyde Cox was negligent in failing to ascertain if the truck was securely braked or blocked, because he should have anti-

cipated that Hal Anderson would negligently fail to set the truck brakes, permitting it to roll onto the plaintiff, but that the plaintiff, to whom the situation was equally apparent was not negligent in placing himself in a position where he might be injured if such occurred and that he had no duty to ascertain or anticipate that if the brakes of the truck were not set or the front wheels of the truck turned in a down hill direction that the truck might roll onto him. Therefore, they are saying what should have been apparent to the defendants as reasonable and prudent men should not have been apparent to the plaintiff under the same circumstances as a reasonable and prudent man. This, of course, makes the standard of care dependent not as it should be on the question of whether or not the actor, be he plaintiff or defendant, acted as reasonable and prudent men under the circumstances would act, but rather whether he is plaintiff or defendant. We contend that as a matter of law, under the evidence, neither the defendant Cox nor the plaintiff West were negligent in failing to anticipate Hal Anderson's negligence. In this instance both were entitled to assume that the defendant Hal Anderson had exercised reasonable care to set the truck brakes and place it in low range gear so that it would remain in position during the loading operation; however, if Cox was negligent in failing to anticipate that Hal Anderson would be negligent, and West would be injured thereby, was not West under an equal if not a greater duty to likewise anticipate Anderson's negligence and the probability of injury to himself. After all, his personal safety was involved. We submit

that if under these circumstances Cox was negligent, then West must also have been contributorily negligent as a matter of law.

POINT III. THE COURT ERRED IN ITS INSTRUCTIONS, SUBMITTING ISSUES TO THE JURY WHICH WERE NOT SUPPORTED BY THE EVIDENCE AND OVER-ACCENTUATED PLAINTIFF'S THEORY.

In the second point of this brief, we have already discussed the court's error in submitting the issues of negligence on the part of the defendants Malcolm N. McKinnon and Clyde Cox, which was not warranted under the evidence in the case or the law applicable thereto. Specifically, the issue that these defendants were negligent in failing to ascertain that the truck was securely braked or blocked so that it would not run down hill while being loaded. We will not, therefore, discuss the matter further here.

The court's instructions placed undue emphasis on the plaintiff's theory of the case and did not give equal emphasis to the theory of the defendants. Let us first review the instruction dealing with the duties of the various parties:

In instruction number 10, the court instructed the jury:

“You are instructed that Hal Anderson owed Steven L. West a duty to use reasonable care not to injure him, and he had a further duty to conduct himself in regard to the manner in which he parked and attended his truck as a reasonably prudent man would do under the same or similar circumstances. In determining whether or not Hal Anderson used ordinary care and conducted him-

self as a reasonably prudent man, you should take into consideration the lay of the land, the manner in which the wheels of the truck were turned when it was abandoned, the amount of care and consideration which was given to the truck after it was parked and while it was being loaded, and all of the surrounding circumstances existing at the time of the happening of the event in question."

The court will note that the instruction goes into great detail as to the matters which might be taken into consideration and should have been sufficient for all purposes; however, the court reiterated the same point thereby giving them overemphasis in instruction number 11, which was to the effect:

"You are further instructed that in parking his truck on a down hill grade at the loading place, Hal Anderson had a duty to set the hand brake securely before leaving his truck unattended; and if he failed to do this, he would be guilty of negligence.

"You are further instructed that it was his duty to turn the front wheels of the truck in such a manner that it would not run down hill if the brakes should become loosened; and if a reasonably prudent person in the exercise of ordinary care would have foreseen that the brakes might loosen and the truck leave its stationary position, then the said Hal Anderson would be negligent in leaving the wheels pointing in a down hill direction."

Although these two instructions were concerned with the issue of Hal Anderson's negligence, inasmuch as the court in his instructions submitted the issue of whether Cox had a duty to anticipate such negligence, the instruc-

tions over-emphasized the duty of Cox and accentuated the plaintiff's theory of recovery.

In instruction number 12, the court undertook to instruct the jury on the negligence of Clyde Cox and it will be noted that the court did so in very positive language, setting out specifically the duty of Clyde Cox and again went into great detail in the manner in which he may have been guilty of a breach of that duty.

Instruction number 12 was as follows :

“You are further instructed that Steven L. West was a business invitee upon the American Fuel Company property, and Clyde Cox as an employee owed Steven L. West a duty to use reasonable care to avoid harming him. That is to say, Clyde Cox was under an obligation to conduct himself in reference to his business invitees as a reasonably prudent man would do under the same or similar circumstances.

“In determining whether or not Clyde Cox failed to use ordinary care in the loading of the truck, you may take into consideration the type of equipment he was using, the fact that the truck in which he was loading coal was unattended and was being loaded while the front end of the truck faced downhill at a grade of approximately six per cent, the fact that there were no blocks placed under the wheels of the truck while it was being loaded and the fact that Clyde Cox had not checked to see if the truck was in gear or if the brakes were set thereon before he started to load the same.

“If in this regard you find by a preponderance of the evidence in this case that Clyde Cox failed to act as a reasonably prudent man would

have acted under the same or similar circumstances, then I instruct you that he would be negligent. If on the other hand you find that he did act as a reasonably prudent man would have acted under the same or similar circumstances in the manner in which he loaded the truck, then I instruct you that he would not be negligent."

The only instruction wherein the court dealt with the negligence of the plaintiff was instruction number 13. You will note that the said instruction starts out with the assertion that Steven L. West was in a position below the place where the truck was being loaded and on the other side of the roadway, which seemed to be an indication on the part of the court that the court felt he was in a safe place, and then goes on to tell them that if they should find that he was in a place where motor vehicles did not ordinarily travel, he would not be negligent. The court in its conclusion, realizing the error of which it had been guilty, did attempt to qualify the instruction by the admonition that if a prudent man could have foreseen that the truck might be set in motion and might run in and upon the general area in which he was reclining, then he would be negligent in assuming the position he did without keeping an adequate lookout for his own safety:

"You are instructed that the evidence is undisputed that immediately before Steven L. West was injured he was sitting or reclining with his hat over his eyes in a position below the place where the truck was being loaded and on the other side of the roadway. You are further instructed that if you find from the evidence that Steven

L. West was in a place which was ordinarily safe and upon which motor vehicles did not ordinarily run, he would not be negligent in taking that position unless a reasonably prudent person at that time could have foreseen that a truck being loaded might be set in motion and would likely run into the area where he placed himself. However, if an ordinarily prudent man could have foreseen that a truck being loaded might be set in motion while being loaded and that it would likely run in and upon the general area where Steven L. West was reclining, then Steven L. West would be negligent in assuming the position he did without keeping an outlook for his own safety."

Instruction number 13 loses sight of the general duty of a reasonably prudent person to exercise reasonable care for his own safety under all the circumstances. It does not tell the jury that a man would be negligent in placing himself in a position in which a reasonably prudent person would realize that he may be injured but merely tells them that if he did place himself in such a position that he must keep a lookout for his own safety.

In the recent case of *Devine v. Cook*, decided by the Utah Supreme Court on February 7, 1955 Utah, 279 P2 1073, this court held that it was error for the trial court to overaccentuate the duties of one party and minimize the duties of the other. It pointed out that this might be done in a number of ways, such as giving the instructions pertaining to one party in a positive manner and those pertaining to another in a negative manner and not giving a number of instructions on the duty of one party and only a few instructions on the duty of another. The court said:

“We conclude that the Court, by the qualifying terms used, cast doubt as to the existence of any injuries suffered by the plaintiffs and characterized the conduct of the plaintiffs as negligence.

In holding that the Court erred in giving the instructions in this case, we cite with approval the law enunciated in the case of *Keeshin Motor Express Co., Inc. et al v. Glassman*, 219 Ind. 538, 38 NE 2d 842, 850, in which 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. They 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.’

“In the case of *Shields v. Utah Light & Traction Co.*, 99 Utah 307, 105 P. 2d 347, 349, in which the court stated: ‘the reiteration of given propositions to the jury in the instructions does not have judicial approval’, and after reviewing the detailed instructions the Court stated:

‘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.’
“Even assuming that the instructions of the

Court taken in their entirety could be considered correct as given, the continual repetition of instructions on contributory negligence and the positive delineation of the duties of the plaintiffs, as contrasted with the qualified negative statements of the duties of the defendants, unbalanced the instructions in favor of the defendants and influenced the jury in bringing its verdict of no cause of action as against all three plaintiffs, and therefore constituted reversible error."

The trial court in this case has been guilty of the same error as that in *Devine v. Cook*, (supra). The duties of the defendants in this case were outlined in a very detailed and positive manner. Every possible element of negligence conceivable under the evidence in the case was covered, yet in the instructions pertaining to the conduct of the plaintiff, this was covered in a general way and stated in a negative manner; that is, the court instructed the jury that the plaintiff was not negligent unless they found certain things, rather than instructing them in a positive manner as to his duties to use reasonable care for his safety.

In the special verdict under Sections VI and VII, the court submitted the issue of whether or not the plaintiff had sustained any yearly loss of earning capacity as a result of this accident, and the number of years during which such loss would continue.

The only evidence in the record on this point discloses that the plaintiff earned \$2,600 per annum for the year 1952, as disclosed by his income tax return, and \$2,400 during the year 1951. Since his recovery, he testi-

fied that he had been earning approximately \$300 per month. There was no evidence in the record whatsoever that he was qualified for or could earn in excess of \$300 per month were it not for the injuries he sustained in this accident. This being the case, there was absolutely no evidence in the record upon which a verdict for any loss of earning capacity could be based, and it was error to submit this issue to the jury.

Physical injury and impairment of earning capacity are not synonymous and the one does not necessarily follow from the other. As was said by the court in *Schlatter v. McCarthy*, 113 Utah 543, 196 P2 968:

“The evidence established with reasonable certainty that plaintiff would sustain a permanent disability to his right leg of at least ten per cent. However, a distinction must be made between a permanent injury and a permanent impairment of earning capacity. The extent of the disability to a limb or other part of the human machine is not generally the measure of the extent of the impairment of earning capacity. A few examples will illustrate: A 50% permanent disability of the left hand of a practicing lawyer would probably not impair his earning capacity to the extent of 50%. He would still be able to interview clients, to read cases, to walk to and from the court room, and to perform all the other duties ordinarily incident to the practice of his profession. On the other hand, a 50% permanent disability of the left hand of a concert pianist would probably amount to total impairment of his earning capacity. So also, permanent disfiguring injuries, even of a slight nature, might result in almost total impairment of earning capacity of a professional actress or, model, whereas serious disfigurement, unless ac-

accompanied by loss of bodily function, would hardly impair at all the earning capacity of a day laborer."

It may be true that the plaintiff might not have been able to perform the same work at which he was employed before the accident; however, the accident in this respect proved a financial benefit rather than a loss, by forcing him into an occupation which brought him greater compensation than he had been earning prior thereto. We submit that the evidence on this point is wholly insufficient to sustain the verdict.

The court's instruction number 9(a) correctly defined the theory of law which was applicable under the evidence in this case to the defendants Malcolm N. McKinnon and Clyde Cox. Instruction number 9(a) provided:

"You are further instructed that any person has a right to rely upon the assumption that other people will not be negligent unless and until some act is done by another person to indicate to the contrary."

Under this instruction, Cox was entitled to assume that the defendant Anderson had securely braked his truck when it was parked for loading. The evidence shows that in all of Cox's experience, no truck had rolled away when parked for loading and there was nothing whatever to indicate to him that Anderson had not securely braked his truck. He assumed, and as stated and implied in the above instructions, had a right to assume, that Anderson had not been negligent, but on the contrary, that he had made the truck secure in order that

Cox might proceed with the loading. Now, notwithstanding the evidence and the above quoted instruction, the court unfortunately and erroneously gave that portion of instruction number 12, which reads:

“In determining whether or not Clyde Cox failed to use ordinary care in the loading of the truck, you may take into consideration the type of equipment he was using, the fact that the truck into which he was loading coal was unattended and was being loaded while the front end of the truck faced down hill at a grade of approximately six per cent, the fact that there were no blocks placed under the wheels of the truck while it was being loaded, and the fact that Clyde Cox had not checked to see if the truck was in gear or if the brakes were set thereon before he started to load the same.”

As has been shown under the authorities cited in Point II of this brief, the defendants Clyde Cox and Malcolm N. McKinnon had no such duty, for the reason that they were not required to anticipate the negligence of others and for the further reason that it was not reasonably foreseeable that the defendant Anderson would fail to set the brakes of his truck or place the same in gear, and that by reason of his failure so to do, the truck would roll down hill and over and upon the plaintiff, and that the plaintiff would negligently place himself in a position in which he might be run over if the truck did roll forward and would thereafter negligently fail to further observe the truck or give any attention to the loading activities.

Instruction number 12 is entirely inconsistent with

instruction number 9(a), for if Cox was entitled to assume that Anderson had properly performed his duty of securely braking the truck (and there can be no question that such was his duty), then Cox cannot be held liable for proceeding to load the truck under such an assumption without inspecting it. In other words, by instruction number 12, the jury was instructed that Cox was liable if he failed to ascertain the condition of the truck, when by the other instruction, the jury was told in effect that he was entitled to assume that it was securely braked for loading.

“The giving of contradictory instructions is error.”

Konold v. Rio Grande Western Ry., 21 Utah 379, 60 P. 1021; *Jensen v. Utah Ry.*, 72 Utah 376, 270-P 349. In the Jensen case the court remarks :

“The appellant urges that the charge given at the request of the defendant is in conflict with paragraphs 7 and 8 of the charge given at request of the plaintiff, and in such particular invoked the rule stated in *Konold v. Rio Grande Western Ry.*, 21 Utah 379, 60 P. 1021, 81 Am. St. Rep. 693, that the giving of inconsistent instructions is error and sufficient ground for reversal of the judgment, because, after verdict, it cannot be told which instruction was followed by the jury, or what influence the erroneous instruction had on their deliberations, and, as stated in *Randall Instructions to Juries*, 537, that where instructions of the successful party state an erroneous rule, and those of the defeated party state the rule correctly, the only presumption permissible is that the jury disregarded the true rule for the false, that an error of instruction presenting a wrong theory

of the case is not cured by other instructions announcing a right theory; and, that where instructions are in irreconcilable conflict, or so conflicting as to construe or mislead the jury, the rule requiring instructions to be read together has no application."

In *State v. Waid*, 92 Utah 297, 67 P2 647, it was held:

"The giving of inconsistent and contradictory instructions on a material point is error and sufficient ground for reversal."

Thus it is seen that the instructions are erroneous, not only because instruction number 12 places upon the defendants Malcolm N. McKinnon and Clyde Cox a duty which they did not have, but also because instructions 9(a) and 12 are inconsistent. Instruction 9(a) correctly stated the laws of the case while instruction 12 permitted the jury to find against the defendants Malcolm N. McKinnon and Clyde Cox on the basis of their failure to do that which instruction 9(a) said they were not obligated to do.

In the court's instruction number 17, the court repeated the error it had made in submitting the issue of loss of earning power to the jury by instructing the jury that in determining the amount of damages which the plaintiff had suffered, they should also take into consideration the loss of earning capacity, if any, which Steven L. West has sustained. On this point, the court further instructed:

"In this connection, you should award to the plaintiff such sum of money as you find from a preponderance of the evidence he has lost from

being unable to carry on his usual work since the date of the accident to the present time, and you should also consider whether or not a preponderance of the evidence shows that his capacity to earn money in the future has been diminished. You are further instructed that the court will apply the mathematical formula to arrive at the present worth of future earnings if the jury will fix the amount of loss in earning capacity and determine the number of years during which the plaintiff would sustain such a loss.”

Not only was this instruction erroneous for the reasons pointed out above, but the last part of the instruction seems to imply that the jury should return some kind of finding in this regard so that the court could apply a mathematical formula. The foregoing practically required the jury to return a verdict for the plaintiff, further accentuating the plaintiff’s theory of recovery.

In connection therewith, the court failed to give the jury the usual instruction, defendants’ request number 15, that the fact that he had instructed them on damages was not to be taken by the jury as an indication of whether he believed or did not believe that the plaintiff was entitled to recover. The court intended to give this request and indicated that he had done so (R 113); however, a perusal of the instruction given will show that such was not done. The court also apparently intended to give the defendant Cox’s requested instruction number 6, (R 104) submitting the issue of unavoidable accident, and requested instruction number 7 (R 105) submitting the issue of whether the accident was solely caused by the negligence of Hal Anderson, which were necessary to present the

defense theory of these defendants, but did not do so; nor were these requested instructions covered by those which were given (R 116-128).

The manner in which this accident happened was so unusual and required a combination of circumstances so unlikely to occur that the jury might reasonably have found that no one was negligent or legally responsible for the accident and an instruction to the effect that if the jury should so find, they should not return a verdict for the plaintiff against the defendants Cox and McKinnon would have been proper.

By their requested instruction number 10, the defendants Malcolm N. McKinnon and Clyde Cox requested the court to instruct the jury as follows:

“You are instructed that the defendants Cox, McKinnon, doing business as American Fuel Company and Eastern Utah Development Company, had a right to assume that when said truck was parked for loading its brakes were in good condition and that they had been securely set, and if necessary, that the truck had been placed in a gear which would restrict its forward movement so as to hold said truck in place during the loading operation performed by the usual and ordinary method and performed with the same care as would be exercised by an ordinarily prudent person under like circumstances. Therefore, if you find from the evidence that said loading operation was performed with ordinary care as in this instruction defined, said defendants would not be responsible for plaintiff's injuries no matter what caused the truck to roll forward from the place where it had been parked for loading,

and your verdict should be for said defendants, and each of them, no cause of action.”

As stated under Points I and II of this brief, this instruction included all of the issues of fact on defendants’ theory of defense, and the correct rule of law applicable thereto. By refusing to give it, the court failed to instruct the jury on defendants’ theory of the case.

CONCLUSION

The evidence is undisputed that this accident did not happen because of the manner in which Cox loaded the truck. The moving pictures established conclusively that if the brakes of the truck had been parked in the low range gear ratio with the brakes set, it would not have moved during the loading operation, and the jury in its answers to the interrogatories so found. If Clyde Cox was entitled to assume that the truck was properly parked and the brakes set, as the jury was instructed in 9 (a), he did not have a duty to check the truck before commencing to load it, nor was he under a duty to defer loading it, unless Anderson stayed in the cab. The “fore-sight” rule and not the “hindsight” rule is applicable in this situation, as in other cases involving negligence. These truckers owned their trucks and were in a hurry to get loaded and on their way, as they were paid according to the tonnage hauled. Was it reasonable to require Cox to be familiar with the brake mechanism of all the various trucks coming upon the premises, or to delay loading operations pending an examination to see that each truck was properly braked? These men would re-

sent undue interference any such conduct on the part of Cox on how they should operate their trucks. Could not Cox assume, until reasonably apprized to the contrary, that Anderson would take whatever precautions were necessary to insure the safety of the truck he was driving?

The injuries in this case were severe. Because of the sympathy which a jury would naturally have for the plaintiff as against the American Fuel Company, a corporation, it was essential that the instructions set out the theory of both sides fairly and adequately, which was not done. Because of the undue emphasis in the instruction on the plaintiff's theory of recovery, it would be an unusual jury that would not return a verdict against the defendants.

We respectfully submit that the verdict in this case should be set aside and a judgment of No Cause of Action entered in favor of the defendants Malcolm N. McKinnon and Clyde Cox, or in the alternative that they be granted a new trial.

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