

1971

Lloyd E. Lish, Jr. v. Utah Power & Light Company, A Maine Corporation : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

DOYD E. LISH, JR.,

Plaintiff-Respondent,

vs.

Case No.
12474

UTAH POWER & LIGHT

COMPANY, a Maine corporation,

Defendant-Appellant.

BRIEF OF RESPONDENT

Appeal from the Judgment of the Second Judicial
District Court in and for Weber County, State of Utah

Honorable Calvin Gould, Judge

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IN THE SUPREME COURT OF THE STATE OF UTAH

LLOYD E. LISH, JR.,

Plaintiff-Respondent,

vs.

UTAH POWER & LIGHT
COMPANY, a Maine corporation,

Defendant-Appellant.

} Case No.
12474

BRIEF OF RESPONDENT

STATEMENT OF THE KIND OF CASE

This is an action for personal injuries sustained by the plaintiff when a metal probe which he was holding in his hands came in contact with the defendant's high voltage electric power line.

DISPOSITION IN THE LOWER COURT

The case was tried in the District Court of Weber County, State of Utah, before the Honorable Calvin Gould, sitting with a jury. The jury returned a verdict in favor of the plaintiff and against the defendant.

RELIEF SOUGHT ON APPEAL

Plaintiff seeks to have the judgment of the trial court affirmed and for an order reforming the judgment to add the sum of \$13,675.56 which was awarded by the verdict.

STATEMENT OF FACTS

The accident giving rise to this case occurred on the morning of February 28, 1969, at a grain bin owned by Willard R. Smith, Jr. in Holbrook, Idaho. (R. 1, T. 93, 262) The plaintiff had gone to the grain bin to obtain samples of the grain in connection with his occupation as a grain buyer. (T. 93)

The grain bin owned by Mr. Smith was located immediately adjacent to the south side of a highway which runs in an east-west direction. The high voltage power line owned by defendant was also located on the south side of the highway. (T. 10; See diagram of scene attached as an exhibit to R. 16) The grain bin has permanently affixed ladder rungs on the north side which is closest to the defendant's power line and was constructed in 1946 sometime prior to the time the power line was constructed. (T. 263, 264) At the time it was originally constructed, the defendant's power line consisted of one energized and one neutral line, both of which were placed on poles which were erected without cross-arms. Approximately a year or two prior to the accident, the defendant modified its power line by adding cross-arms to the poles. This remodeling had the effect of moving the near-

est energized line approximately four feet closer to the grain bin. (T. 301)

At the time of the accident, the nearest energized wire was 9.01 feet from the grain bin according to the plaintiff's expert and 9.77 feet from the bin according to defendant's expert which measurements were both made by surveying devices. (T. 10, 285) The defendant's power line consisted of three energized wires and one neutral wire with the voltage being 12,500 from one line to another and 7,200 from each line to ground. (T. 298)

The plaintiff arrived at the grain bin and took three or four three foot sections of a probe with him and climbed up the ladder rungs and into the grain bin through the hole in the top. (T. 96) Plaintiff assembled the sections of the probe after he was inside of the grain bin and then obtained the grain samples by inserting the probe down into the grain and retracting the same. He then started to climb out of the bin by the hole at the top with the probe still assembled. Plaintiff had kept the probe in an assembled condition because he was going to probe a nearby grain bin and at this length it would fit easily into the pickup truck which he was driving. (T. 98, 99) As plaintiff was sitting on the grain bin with one foot in and one foot out of the entrance hole and in the process of removing the probe from the bin, it came in contact with the defendant's power line, which resulted in severe and permanently disabling injuries to plaintiff. (T. 100)

Plaintiff had travelled the road adjacent to the power line on other occasions and was aware of the poles which he described as "telephone poles" but stated he was not fully aware that this was an electric power line. (T. 175, 176) Plaintiff further testified that he did not observe the power lines when coming out of the bin and that he thinks he could tell a high voltage electrical wire from a telephone wire because the high voltage electric wire may be insulated. (T. 189, 191) However, the power lines involved in the accident were not insulated. (T. 238, 239)

All of the employees of the defendant who testified at the time of the trial stated that the company has in its stock as standard equipment signs which state "Danger - High Voltage" or words to that effect and are white with a red background. (T. 84, 85, 91) None of these signs were placed on the grain bin or on the power line of the defendant in the area where the accident occurred. The defendant's employees also testified that wires identical to the ones which plaintiff came in contact with were used to carry from 110 to 44,000 volts and there was no way to tell the voltage in the wire simply by looking at it. (T. 249) They also concede that the general public knows less what to guard against than experienced power company employees and that the defendant had no measurements of the distances between the power lines in question and the grain bin until preparing for the trial of the case. (T. 258, 261).

Defendant's employees further admitted that the ladder rungs on the outside of the grain bin facing the power line and the access hole at the top were obvious to anyone passing the area (T. 255) and that persons would climb the bin in order to enter the same and use mechanical grain augers to load and unload the same. (T. 256)

Mr. Smith, the owner of the grain bin where the accident occurred, testified that prior to the time of this accident he was only familiar with brass probes which were not in sections and were anywhere from six to ten feet in length and that it would be very easy in using one of these types of probes to come in contact with the defendant's power line. (T. 267, 269) Also Galen Christensen, who had been engaged in the grain business for twenty-seven years, stated that in his opinion, the high voltage line in such close proximity to a grain bin would be very hazardous to the operations in loading and unloading the bin and in taking samples of the grain. (T. 53, 58, 59)

The case was submitted to the jury and they returned a verdict in favor of the plaintiff and against the defendant and awarded special damages in the sum of \$17,500.00 and general damages of \$32,500.00. The parties had informally agreed that the claim of the plaintiff for loss of income, past and future, should be treated as an item of general damages just prior to the case being submitted to the jury. (T. 319) However, the instruction concerning general damages did not include the element of lost income. (R. 21)

After the verdict had been returned, the trial judge amended the verdict by deleting the sum of \$13,675.56 from the award for special damages. (T. 319-321) Thereafter, the plaintiff made a motion to reform the verdict by adding the sum deleted from the award for special damages to the sum awarded for general damages (R. 27) which motion was denied by the Court. (R. 28, 30)

ARGUMENT

POINT I.

THE JUDGMENT AND PROCEEDINGS IN THE TRIAL COURT ARE PRESUMED TO BE CORRECT.

There are numerous cases supporting the general proposition of law stated in Point I. and no cases have been found by respondent stating a contrary position.

There is not only a presumption of validity on appeal of the judgment and proceedings in the trial court, but the burden is on the appellant affirmatively to demonstrate error, and in the absence of such, the judgment must be affirmed by the reviewing court. *Whitehead v. Adair*, 10 Utah 2d 282, 351 P.2d 956; *Coombs v. Perry*, 2 Utah 2d 381, 275 P.2d 680. In addition to being presumed to be correct, every reasonable intendment must be indulged in favor of the judgment of the trial court. *Burton v. Zions Co-op Mercantile Institution*, 122 Utah 360, 249 P.2d 514; *Nagle v. Club Fontainblue*, 17 Utah 2d 125, 405 P.2d 346; *Petty v. Gindy Manufacturing Corporation*, 17 Utah 2d 32, 404 P.2d 30.

The foregoing proposition is especially true in cases which have been submitted to a jury, and the trial court has given its approval to the verdict by denying a motion for a new trial as is the case here. In this regard the Utah Supreme Court in the case of *Gordon v. Provo City*, 15 Utah 2d 287, 391 P.2d 430, stated as follows:

"The purpose of the trial is to afford the parties a full and fair opportunity to present their evidence and contentions and to have the issues in dispute between them determined by a jury. When this objective has been accomplished, and the trial court has given its approval thereto by refusing to grant a new trial, the judgment should be looked upon with some degree of verity. The presumption is in favor of its validity and the burden is upon the appellant to show some persuasive reason for upsetting it. * * *" (15 Utah 2d p. 290)

POINT II.

THE ISSUE OF CONTRIBUTORY NEGLIGENCE WAS PROPERLY SUBMITTED TO THE JURY.

At the conclusion of the evidence, counsel for both plaintiff and defendant made motions for directed verdicts which motions were denied by the court, and the case was submitted to the jury. (T. 310, 311) The jury was given ample and correct instructions concerning the issue of contributory negligence. Instruction No. 9 sets forth the general proposition that one negligent party may not recover from another negligent party if such negligence contributes in any degree to the cause of the accident. Instruction No. 10 sets forth the definitions of

negligence, contributory negligence, ordinary care and proximate cause in a correct fashion. In addition to the foregoing, Instruction No. 15 given by the Court was requested by the defendant and provides as follows:

"The plaintiff must exercise reasonable care for his own safety. If you find from the evidence that the plaintiff failed, in the exercise of due care, to observe the power lines of the defendant, or if you find that the plaintiff in the exercise of due care should have observed the said power lines and avoided the accident and that such failure proximately contributed in any degree to the accident of which plaintiff complains, then your verdict must be against the plaintiff, no cause of action."

The content of this instruction was substantially reiterated in Instruction No. 18 given by the Court in advising the jury that if the plaintiff was found to be contributorily negligent, a verdict of no cause of action should be returned. (R. 21)

This Court has repeatedly held that the issues of negligence and contributory negligence are for the jury when reasonable minds could differ as to whether or not the party had acted as would a reasonable and prudent person under the given circumstances. In reiterating this proposition, the Supreme Court in the case of *Hindmarsh v. O. P. Skaggs Foodliner*, 21 Utah 2d 413, 466 P.2d 410, stated as follows:

"The burden of proving the plaintiff's contributory negligence is upon the defendant. The trial court could properly take the issue from the jury and rule that the plaintiff was contributorily negligent as a matter of law only if the evidence demonstrated that fact with sufficient certainty that all reasonable minds would so find. Conversely, if the evidence is such as to permit reason-

able minds to differ as to whether the plaintiff was guilty of contributory negligence, the question is for the jury to decide. * * *” (21 Utah 2d p. 415)

Other cases setting forth the foregoing proposition are *Sumsion v. General Motors Corporation*, 24 Utah 2d 301, 450 P.2d 399; *Grant v. Pelton*, 16 Utah 2d 7, 394 P.2d 897; *Jensen v. Dolan*, 12 Utah 2d 404, 367 P.2d 191; and *Moore v. Miles*, 108 Utah 167, 158 P.2d 676.

In the case of *Glen v. Gibbons & Reed Co.*, 1 Utah 2d 308, 265 P.2d 1013, the trial court set aside a jury verdict for plaintiff. On appeal, the Supreme Court reversed and reinstated the jury verdict and in addressing itself as to the issue of whether or not the plaintiff was contributorily negligent as a matter of law stated as follows:

“ * * * Too, more than one inference can be here drawn as to what reasonably prudent men would do under the particular circumstances, which makes the question of contributory negligence one for the jury. * * * ” (1 Utah 2d p. 312)

The defendant in its brief cites several cases which set forth the general proposition that a person may be guilty of negligence or contributory negligence as a matter of law if he either looked and failed to see what was there to be seen or if he failed to look. Plaintiff does not disagree with this rule, however, it is clearly inapplicable to the fact situation of the instant case.

In this case, the plaintiff indicated that he was familiar with poles which he described as “telephone poles” running along the highway adjacent to the grain bin.

However, he had no specific knowledge that these were high voltage power lines and, in fact, said he thought power lines were covered by an insulation material, and these lines had no such insulation. In addition, the power pole closest to the grain bin is some fifty-six feet away in an easterly direction. (See diagram of scene attached as an exhibit to R.16) The plaintiff did not observe the wires upon entering the grain bin for the purpose of probing the same to obtain grain samples or at the time he was exiting from the bin when the accident occurred. His testimony in this regard is as follows:

“Q. Do you have 20-20 vision?

A. Yes. I wasn't looking for power lines, I was up probing a grain bin.

* * * * *

Q. Did you — you didn't make any observation to see how close the power line was to the grain bin, did you, before you entered?

A. I had no reason to.

Q. But you didn't do it, did you?

A. No.

Q. And when you got to the top of the ladder you didn't make any observation to see the power lines behind you, did you? To the north of the bin.

A. No, I had no reason to.

Q. And when you came up out of the bin and looking directly to the north and gradually swung around to the east and to the southeast once again, you made no observation as to the power lines did you?

A. No, I never.” (T.186, 188, 189)

This Court has held that if the conduct being undertaken by the plaintiff justifies giving some of his attention in a direction or to matters other than those from which the accident arose, then it cannot be said that he is guilty of contributory negligence as a matter of law. This principle is set forth in the *Hindmarsh* case, supra, as follows:

"We refocus our attention on what we have stated above to be the critical and controlling issue in this case: defendant's contention that the plaintiff must be held guilty of contributory negligence as a matter of law. This argument is grounded upon this concededly correct proposition: where there is a danger plainly to be seen, and the plaintiff fails to avoid it, it is ordinarily ruled that she was negligent either in failing to look or in failing to heed. *However, this is subject to the qualification that if there is something which justifies plaintiff giving part of her attention elsewhere so that in the total circumstances it can reasonably be believed that she was guilty of contributory negligence as a matter of law is not compelled.*" (21 Utah 2d p. 416, 417) (Emphasis added)

In the *Hindmarsh* case, the plaintiff had slipped and fallen in the defendant's parking lot on a patch of ice and snow and was not watching at all times where her feet were being placed due to the fact that she was also observing the movement of cars in the parking lot. Also in *Campbell v. Safeway Stores, Inc.*, 15 Utah 2d 113, 380 P.2d 409, the Court pointed out that a person may not be held to be contributorily negligent as a matter of law if there are extenuating circumstances which impair the

ability of the person to see the hazard or if the person is justifiably preoccupied in looking in a different direction.

Defendant cites the case of *Hale v. Montana-Dakota Utilities Co.*, 192 F.2d 274 (C.A.8, S.D.) in support of its contention that the plaintiff was guilty of contributory negligence as a matter of law. In determining whether or not a person injured by coming in contact with an electric power line may be held contributorily negligent as matter of law, the courts have generally divided the cases into categories of those fact situations where the party injured had no special knowledge of the dangerous condition and those cases where the person injured knew of the specific condition faced by him or had been given a specific warning about the same. In the former fact situation, the courts have quite universally held that the question of contributory negligence is a matter to be submitted to the jury and in the latter type of cases, some courts have held that the issue of contributory negligence may be ruled on as a matter of law.

The *Hale* case, cited by the defendant, is clearly within the category of the cases involving fact situations where the person knew of the danger and is so classified in an excellent annotation covering the subject of 69 A.L.R. 2d 9. This annotation states as follows:

"In actions against the power company for injuries due to contact, through a held object, with a power wire, whether the victim was contributorily negligent has generally been held to present a question for the jury, particularly where it appears that he did not have knowledge of the specific nature which caused his injury.

In some cases the question of contributory negligence has been held for the jury without regard to the injured person's knowledge or lack of knowledge of danger. * * *

Where it appears cases of the kind here dealt with that the injured person had no special knowledge of electricity, and lacked particular knowledge of the dangerous condition which caused his injury, the court generally held the question of his contributory negligence is for the jury." (60 A.L.R. 2d at p. 51, 52)

In the case of *Potter v. SAC-Osage Electric Cooperative, Inc.*, 335 S.W. 2d 192 (Mo., '60), the plaintiff's decedent was killed while adjusting a piece of tin on top of a grain storage bin and contacted the defendant's electric power line which was approximately six feet above the bin. The accident occurred only one day after the decedent's brother had received an electric shock while working on the bin. The Supreme Court of the State of Missouri in affirming the decision of the trial court in submitting the issue of contributory negligence stated as follows:

"The evidence was such that a jury reasonably could have found that the decedent was guilty of negligence which barred plaintiff's recovery. The jury could reasonably have found that * * * [decedent] failed to exercise ordinary care for his own safety commensurate with all the facts and circumstances in evidence. We may not say, however, that reasonable men might not fairly reach different conclusions on the evidence viewed most favorably from plaintiff's standpoint. We therefore may not declare as a matter of law that plaintiff's decedent was guilty of contributory negligence. We are of the opinion that the trial court properly left that to the jury."

POINT III.

THE INSTRUCTIONS GIVEN BY THE TRIAL COURT WERE CORRECT AND DID NOT RESULT IN ANY PREJUDICE TO DEFENDANT.

INSTRUCTION NO. 14

Jury Instruction No. 14 which was requested by the plaintiff and given by the Court states as follows:

"You are instructed that a high tension transmission wire is one of the most dangerous things known to man. Not only is the current deadly, but the danger is hidden away in an innocent looking wire ready at all times to kill or injure anyone who touches it or comes near it. For the average citizen, there is no way of knowing whether the wire is harmless or lethal until it is too late to do anything about it. Therefore, a high degree of duty is supposed upon one who transmits electricity in high tension wires to see that no harm befalls a person rightfully in proximity thereto when that person is himself guilty of no wrong-doing. In other words, the highest degree of care must be used to prevent harm from coming to others.

Failure to comply with this duty by Utah Power & Light Company would be negligence."

The first paragraph of Instruction No. 14 was taken directly from the decision of the Supreme Court in the case of *Brigham v. Moon Lake Electric Association*, 24 Utah 2d 292, 470 P.2d 393. In the *Brigham* case, the plaintiff, a ten year old boy, was injured when he came in contact with the defendant's high voltage power line after the pole supporting the same had fallen. The issues of negligence and contributory negligence were submitted

to the jury, and the jury returned a verdict finding the defendant guilty of negligence and the plaintiff guilty of contributory negligence and that each was a proximate cause of the accident.

Defendant contends that this instruction was erroneous and prejudicial upon the basis that some confusion may exist as to what duty is owed by a public utility company who transmits electric power by the interchanging of the words "high degree" and "highest degree". The decision of this Court in the *Brigham* case uses these words synonymously in setting forth the proposition that the degree of care required by the defendant in transmitting electrical power is greater than the degree of care required by a person or corporation engaged in activities which are not as hazardous. To presuppose that some prejudice resulted to the defendant by the synonymous use of the words "high degree" and "highest degree" is without foundation and is at best picayunish.

Defendant further claims that Instruction No. 14 was erroneous and prejudicial to the defendant in that it was argumentative and constituted comment on the evidence which is contrary to the provisions of Rule 51 of the Utah Rules of Civil Procedure.

The introductory sentences in Instruction No. 14 clearly do not constitute commenting on the evidence and were properly included in the instruction by the court in order for the jury to be properly instructed that the standard of care required of the defendant was greater than that of the plaintiff and the reason for this increased

standard. The transmission of high voltage electrical power is a hazardous undertaking and the jury was entitled to be so informed.

Even if the introductory sentences of Instruction No. 14 could be considered as argumentative the same were not prejudicial and as is pointed out by counsel for defendant in its brief:

“* * * The giving of such a charge [argumentative] is not grounds for reversal, unless prejudice to the party complaining results.” 53 Am. Jur., Trial, §552.

In the instant case, the trial court fully instructed the jury on the issues of contributory negligence and negligence. In Instruction No. 8, the Court clearly pointed out that before a recovery could be had by the plaintiff against the defendant, there must be actionable negligence on its part and stated in part as follows:

“* * * Before there can be a recovery, you must find that the action was caused by some actionable negligence on the part of the defendant. In your consideration of the question of negligence, you are limited to the particular acts of negligence indicated in these instructions. * * * ”

This instruction was further amplified by Instruction No. 17 and by the other instructions given by the court. This court and other courts have quite universally held that the instructions are to be read as a whole and should be considered together by the jury without any undue emphasis being placed on any particular instruction and the jury is presumed to have followed this. *Cromeenes v. San*

Pedro L. A. and Salt Lake Railroad Company, 37 Utah 475, 109 Pac. 10; *Cope v. Davidson*, 30 Ed. 193, 180 p. 873.

Defendant cites the case of *Ireland v. Mitchell*, 359 P.2d 894 (Ore. '61) in support of its position that Instruction No. 14 was erroneous and prejudicial upon the grounds that it recited the holding of an opinion of this Court. A review of the Ireland case clearly indicates that it is not error, per se, to quote from the language of a statute or an appellate court opinion but that the trial court must use its discretion in instructing the jury so that they may not be confused or misled by any legalistic or other technical words or phrases in a statute or appellate court opinion. In the instant case, the introductory sentences to the first paragraph of Instruction No. 14 were not legalistic or technical in nature and as indicated above, gave the reasons that a high degree of care is imposed upon a public utility company engaged in the business of transmitting electrical power.

In addition to the foregoing, the Court clearly indicated that it expressed no opinion as to which party should prevail and that the instructions should be considered by a whole and that the jurors were not to single out any single sentence from an instruction and ignore the others. These admonitions were contained in Instruction Nos. 27 and 29 which provide as follows:

"If during this trial the Court has said or done anything which has suggested to you that it is inclined to favor the claims or positions of either party, you will not suffer yourselves to be influenced by any such suggestion.

The Court has not intended to express, nor to intimate, any opinion as to which witnesses are, or are not, worthy of belief; what facts are, or are not, established; nor what inferences should be drawn from the evidence, nor which party should prevail. If any expression has seemed to indicate an opinion relating to any of these matters, you should disregard it, because you are the exclusive judges of the facts."

"These instructions, though numbered separately, are to be considered and construed by you as one connected whole. Each instruction should be read and understood with reference to and as a part of the entire charge and not as though one instruction separately was intended to present the whole law of the case upon any particular point. For that reason you are not to single out any certain sentence or any individual point or instruction and ignore the others, but you are to consider all the instructions, as a whole, and to regard each in the light of all the others."

INSTRUCTION NO. 13

Instruction No. 13 which was requested by the plaintiff and given by the court provides as follows:

"You are instructed that the State of Idaho has adopted National Bureau of Standards Handbook 81 entitled *Safety Rules for the Installation and Maintenance of Electric Supply and Communication Lines* regulating the construction and operation of electric power lines. You are further instructed that Section 234. C. (b) provides in part as follows:

"GUARDING OF SUPPLY CONDUCTORS.
Supply conductors of 300 volts or more shall be properly guarded by grounded conduit, barriers, or otherwise, under the following conditions:

(2) Where such supply conductors are placed near enough to windows, verandas, fire escapes, or other ordinarily accessible places to be exposed to contact by persons.

If you find from a preponderance of the evidence that the defendant violated the regulation above which is designed for the safety of the plaintiff and other person engaged in similar activities, such conduct would be negligence on the part of defendant Utah Power and Light Company.

Defendant's first contention of error in relation to Instruction No. 13 is that the trial court refused to include in this instruction the definition of "guarded" as defined by the National Bureau of Standards Handbook 81. A review of the record fails to indicate any request by the defendant of an instruction setting forth the definition of "guarded" as set forth in the National Bureau of Standards Handbook 81. (R. 20)

This court has properly and quite consistently held that the failure of a party to request a specific instruction precludes him from asserting error on appeal because the same was not included in the instructions given to the jury. See *Galarowicz v. Ward*, 119 Utah 611, 230 P.2d 576; *Hanks v. Christensen*, 11 Utah 2d 8, 354 P.2d 564; and *State By and Through Road Commission v. Kendell*, 20 Utah 2d 356, 438 P.2d 178.

Section 234 C. (b) of the National Bureau of Standards Handbook 81 upon which Instruction No. 13 was based provides as follows:

(b) **GUARDING OF SUPPLY CONDUCTORS**
Supply conductors of 300 volts or more shall be properly guarded by grounded conduit, barriers, or otherwise, under the following conditions:

(1) Where the clearances set forth in table 4 (rule 234, C, 4, (a), (1) cannot be obtained.

(2) Where such supply conductors are placed near enough to windows, verandas, fire escapes, or other ordinary accessible places, to be exposed to contact by persons.

Note: Supply conductors in grounded metal-sheathed cable are considered to be guarded within the meaning of this rule."

As is noted from the rule, there are two circumstances where supply conductors carrying 300 volts or more shall be properly guarded by grounded conduit, barriers or otherwise. The requirement of subparagraph (1) is that the wire be at least 8.72 feet from *a building*, and in this case, the wire was either 9.01 or 9.77 feet from the nearest point on the silo. (T.299) Sub-subparagraph (2) of the section upon which Instruction No. 13 was based requires supply conductors to be guarded when they are placed close enough to "windows, verandas, fire escapes or other ordinary accessible places, to be exposed to contact by persons." Quite obviously the permanently affixed metal ladder rungs and entrance hole at the top of the grain silo constitutes an ordinarily accessible place where a person may be exposed to contact by the power line maintained by the defendant.

Defendant further contends that this section imposes an unusually harsh burden upon them. However, as the note from the section clearly indicates, the supply conductors could have been guarded within the meaning of the rule by placing them in "grounded metal sheathed

cables" which could have been done at little expense. In this regard, the following quotation from 26 Am. Jur. 2d, Electricity, Gas & Steam, §122, appears appropriate:

"* * * The rule that persons controlling so dangerous and subtle an agency as electricity should not be permitted to theorize in regard to its probable effects, or speculate upon the chances of results affecting human life, is only in accord with reason and common sense. The wires must be either insulated or placed beyond the danger line of contact with persons going where they may reasonably be expected to go. * * * Indeed, in view of the danger to human life from the maintenance of uninsulated electric lines in a growing business section, the factor of the expense of insulating the lines deserves little consideration in determining negligence of an electric company. * * *"

INSTRUCTION NO. 17

Instruction No. 17 which was given by the Court provides as follows:

"Before you can return a verdict in favor of the Plaintiff, you must find by a preponderance of the evidence that each of the following two propositions are true:

PROPOSITION NO. 1:

That the Defendant was negligent in one or more of the following particulars:

A. In failing to comply with the National Bureau of Standards handbook No. 81 relating to guarding of supply conductors; or

B. Failing to warn the public of a hazardous condition.

PROPOSITION NO. 2:

That the said negligence of the Defendant, if any, was the proximate cause of the injury.

If you find that the two foregoing propositions are true, you should then consider the issue of contributory negligence as later defined in these instructions."

Defendant contends that Proposition No. 1 A. is incorrect which proposition has been answered by the preceding paragraphs dealing with Instruction No. 13.

Defendant further asserts *INSTRUCTION* No. 17 is erroneous in that there was no evidence introduced that they had a duty to give any warning whatever to plaintiff or other persons similarly situated and that defendant's requested Instruction No. 20 which sets forth the proposition that there is no duty to warn of an obvious danger which was refused by the court should have been given.

Instruction No. 12 which was requested by the plaintiff and given by the Court and to which defendant takes no exception correctly sets forth the duty of the defendant in relation to the other instructions given by the Court. This instruction provided as follows:

"You are instructed that it was the duty of the defendant power company in this case to use that degree of care which was warranted by the individual circumstances at different locations along its high voltage line. In this regard, the degree of care was increased in areas where it might be reasonably anticipated that machinery would be working or that persons would be climbing structures so as to come near to or possibly in contact with the high voltage line."

In addressing itself to the question of what evidence needs to be introduced to establish the duty owed by the defendant, the New Jersey Supreme Court in the case of *Black v. Public Service Electric and Gas Company*, 56 N.J. 63, 265 A.2d 129, stated as follows:

“Expert testimony if offered might well have been received to show that the use or posting of warning signs was standard practice in the electrical utility industry. But in our view it was not at all necessary. The hazard of life and limb arising from contact with lethal wires under the evidence in this case was easily comprehended by the average juror without expert testimony. The conditions present before and at the time of the mishap and the danger associated with them were perfectly apparent and capable of analysis by any person of ordinary understanding. We think such persons acting in the capacity of jurors and comprehending the danger presented by the facts in this case, were competent to decide without expert testimony whether the duty to exercise care commensurate with the risk involved was satisfied when the utility failed to post warning signs on or near the poles or on the uninsulated wires themselves.”

For other cases supporting this proposition, see *Hendersen v. Kansas Power & Light Co.*, 184 Kan. 691, 239 P.2d 702; and *Elliott v. Black River Electric Co-op*, 233 S.C. 273, 104 S.E. 2d 357.

POINT IV.

THE SUM OF \$13,675.56 AWARDED BY THE JURY AS SPECIAL DAMAGES SHOULD BE ADDED TO THE JUDGMENT.

A claim for loss of wages in addition to the claim for medical expenses and general damages was made by the plaintiff in his complaint. (R. 1) During the trial of this case, there was evidence introduced to the effect that the plaintiff had lost substantial amounts of income from his business as a grain buyer during the time that he was convalescing from the injuries he sustained. (T.149-195)

The case was submitted to the jury and a verdict in favor of the plaintiff and against defendant was returned awarding \$32,500.00 general damages and \$17,500.00 special damages. (T.319)

Prior to the case being submitted to the jury, counsel for both sides had discussed the issue of whether or not the claim for lost income should be treated as general or special damages in submitting the case to the jury, and it was agreed that same should be treated as an item of general damages. (T.321) However, in submitting this matter to the jury, Instruction No. 19 which set forth the elements which the jury could consider in awarding general damages does not include the element of loss of income. (R. 21)

Instruction No. 20 stated that the medical expenses should be included in any award of special damages made, and this instruction was followed by Instruction Nos. 21 and 22 which correctly set forth the

elements which the jury could consider in awarding plaintiff damages for loss of income, however, there was no indication that these should be included in the award for general damages.

The Court amended the verdict of the jury by deleting the sum of \$13,675.56 from the award for special damages but did not add the same to the award of general damages. (T. 319-321) Thereafter, a motion was made by the plaintiff to reform the verdict by adding the sum of \$13,675.56 to the award of general damages (R. 27) which motion was denied by the court. (R. 28, 30)

It is the plaintiff's contention that the court was correct in deleting the sum of \$13,675.56 from the award on special damages made by the jury in accordance with agreement of counsel shortly prior to the case being submitted to the jury. However, this award should have been included to the award of general damages made by the jury in view of their clear indication that this loss of earnings had been sustained by the plaintiff.

Although plaintiff is unable to find any Utah case law dealing specifically with the question of whether or not a claim for loss of income should be considered as an item of special damages or as an item of general damages, it is treated generally by the trial courts of this state as being an item of general damages. However, in view of the uncertainty in this regard and the provisions of Rule 9(g) of the Utah Rules of Civil Procedure which requires items of special damage to be claimed specifically a claim for loss of earnings was inserted in the complaint. The

claim for lost earnings was made some time prior to the trial and was alleged to be "in the approximate sum of \$7,000.00", and the evidence introduced at the time of trial showed lost income of from ten to fifteen thousand dollars as well as the loss of future income due to the permanent and disabling injuries sustained by the plaintiff as a result of the accident.

From the verdict of the jury, it is clear that they intended to compensate the plaintiff for the loss of income past and future, which he had sustained and incorporated this item in the award of special damages. A fair reading of the instructions given by the court indicated that the jury was justified in placing the award for loss of income in the category of special damages, and this amount should be added to the judgment which has been entered.

CONCLUSION

This matter was tried by a fair and impartial jury upon instructions which considered together set forth the contentions of both parties. The verdict and judgment entered thereon by the trial court is presumed to be correct particularly where, as here, the plaintiff's motion for a new trial was denied. The verdict and judgment should not be reversed without showing of error which is prejudicial to the defendant and the defendant has failed to demonstrate this.

The verdict of the jury clearly indicates that they intended to compensate the plaintiff for the loss of income, past and future, which he had sustained as a result of his permanent and disabling injuries, and the sum of \$13,-675.56 should be added to the award of general damages rather than merely deleted from the award of special damages.

Respectfully submitted,

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