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Thomas P. Sprunt v. The Denver and Rio Grande Western Railroad Co. : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

FILED

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THOMAS P. SPRUNT,

Plaintiff and Appellant,

— vs. —

The DENVER AND RIO GRANDE
WESTERN RAILROAD COMPANY,
a corporation,

Defendant and Respondent.

Clerk Supreme Court, Utah

Case No.

8957

RESPONDENT'S BRIEF

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Plaintiff and Appellant,

— vs. —

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a corporation,

Defendant and Respondent.

Case No.
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RESPONDENT'S BRIEF

STATEMENT OF FACTS

During the daylight hours of January 4, 1957, the plaintiff, a 58 year old switchman, employed by the defendant company, was injured when he attempted to board an ore car of the defendant company which had just started to move and which was travelling two or three miles per hour. (R. 41). The accident occurred on the switch tracks located on the property of the Vitro Chem-

ical Company. The plaintiff was part of a switch crew which was moving cars loaded with Uranium ore into the private yards of Vitro Chemical Company and moving the empties out (R. 13, R. 24). The process involved bringing in a string of loaded cars, which were unloaded by means of opening dump doors on the sides of the cars, allowing the ore to fall out beside the track (R. 17). The ore was then picked up by a clam shell machine (a diesel machine with a two yard bucket) (R. 18), and deposited in stock piles farther away from the track. Then a bulldozer would proceed along the area to attempt to remove ore that had fallen between the rails and to clean and smooth up the area adjacent to the tracks (R. 28).

Two or three cuts or groups of cars were delivered each day (R. 26) so that 12 to 18 cars a day were unloaded (R. 25, 56). The switching and unloading was a continuous process throughout the day (R. 137). According to the plaintiff the operation of the clam-shell in picking up the ore took bites out of the ground in the area adjacent to the track, which created the existence of numerous holes 8 to 12 inches deep (R. 43). The witness Patterson, another member of the crew, claimed that the bulldozer did not necessarily remove all the holes in the process of its smoothing operation (R. 19). This operation, according to plaintiff and his witness, created a rough area over which the plaintiff and other switchmen had to walk. Patterson testified that the holes were "Maybe three feet, maybe five feet" apart (R. 23).

Plaintiff testified as follows on page 53:

"Q. Even though the track was cleaned up and it was cleaned up as slick as a bowling alley, when

another string of cars would come it would clutter up the situation?

"A. Yes.

"Q. In other words, if you clean up as I say, clean as a bowling alley, you would have to do it two or three times a day?

"A. Yes.

"Q. You would have to interrupt unloading operations?

"A. Not necessarily.

"Q. The work was done in that area by Vitro people?

"A. Yes.

"Q. With their clam shell?

"A. Yes.

"Q. With their bulldozer?

"A. Yes.

"Q. On their track?

"A. Yes.

"Q. On their property?

"A. Well, as far as I know, it is."

Mr. John A. Rask, a retired D & RGW section foreman, well acquainted with the condition of this yard and with the nature of the switching and unloading operation at the time of the accident, was called as a witness by the plaintiff and on examination by plaintiff's counsel, he stated the following:

"Q. At any time you were on these premises, did

you find any smooth path for the switchmen to walk on?

"A. Well, I don't know I have, it has been uneven, it hasn't been too bad; where they unload cars and dump them it is always rough.

"Q. Is it necessary to keep it rough?

"A. It is impossible to keep it otherwise with a continuous operation of those cars.

"Q. You couldn't keep it up with a shovel as you do with the men in your area?

"A. If they had an army of men, but not for each continuous operation.

"Q. What do you mean by continuous operation?

"A. Dumping one car and another one on top, that is a continuous operation all day long." (R. 137)

At the time of the accident there was a "light skiff of snow" on the ground (R. 31). The plaintiff attempted to board one of the moving cars by taking hold of a grab iron on the side of the car with his left hand, putting his foot in a stirrup and swinging himself up onto the car. He claimed his foot slipped or he stepped into a hole, fell and injured his left shoulder (R. 41-42).

Exactly what happened or what he did at the time of the accident is not clear in the plaintiff's mind for he describes it differently in different places in the record.

"Q. (By Mr. Patterson) Now, what happened when you—describe how you started to mount the car, what you did?

"A. Well, as a general rule when you are switching on a lead, or anything, we most generally hit the stirrup with our right foot and most generally

reach up with the one hand, get hold of the grab iron and follow up with the other, when I went to follow up I slipped in the meantime, and I couldn't get the grab iron.

"Q. Why did you slip?

"A. I stepped in a hole.

"Q. Will you describe that hole to the jury, please?

"A. Well, as far as I remember, it was a hole along side the cars where we walked, made by the clam shovel cleaning up the ore.

"Q. Describe the hole itself as much as you can?

"A. I would say the hole was around between eight and twelve inches deep." (R. 42-43)

Later, on cross examination, the plaintiff said:

"Q. Mr. Sprunt, as I understand you reached up with your left hand to board the car going about two or three miles an hour, is that right?

"A. Yes sir.

"Q. When you got your hand on that particular bar, how high would that be?

"A. I would say about even with my face.

"Q. On these dump cars they are kind of low?

"A. Well, yes, your ladder on cars is a standard gauge.

"Q. The grab iron you were going to reach from the ground would be about that high?

"A. Yes.

"Q. You reached with your left hand?

"A. Yes sir.

"Q. When you reached with your left hand, did you put any weight on there for the purpose of boarding the car?

"A. Well, no, not exactly.

"Q. Mr. Sprunt, I am not trying to get you, in detailing the matter to relate what each muscle did in this particular time. When you reached up, what was the usual way to do it, put the weight on one hand?

"A. Most generally put the weight on both hands.

"Q. You reached with the left hand, and hadn't got your weight up?

"A. No sir.

"Q. You were walking when this occurred?

"A. No.

"Q. You were standing still?

"A. Yes.

"Q. So you were standing still when the car came past going about two or three miles an hour and you reached up with your left hand?

"A. Yes sir, that is right.

"Q. Were you standing in a hole?

"A. No I wasn't.

"Q. Did you move your feet before you got aboard?

"A. That is something I can't say.

"Q. As you reached with your left hand, as you started to board, your foot went in a hole?

"A. No, generally when you are boarding a car you swing yourself on, when I went to swing on I slipped." (R. 58-59)

The plaintiff's left hand lost its grip on the grab iron and he fell to the ground (R. 60).

On page 43 of the record, the plaintiff says:

"... it was done so quick I don't know how I fell."

Plaintiff's injuries consisted of a tear of the cuff of the shoulder, the tendons that go around the head bone of the shoulder (R. 69). The plaintiff had suffered two dislocations of the same shoulder, once in 1941 and again from an automobile accident in 1954 (R. 60). Plaintiff's doctor, Charles Hall, acknowledged that the dislocation of the shoulder in 1954 could have caused a tear in the tendons of the plaintiff's shoulder; that it may not have healed; that it could have caused a weakness to exist in the shoulder which would cause it to "give away easily" upon a subsequent occasion (R. 75). The doctor said it would be impossible for him to date the tear which he observed some time after the January 4, 1957 accident and would not be able to say with certainty whether or not the tear, or part of it, had existed prior to the January 4 accident, but that in any event a previous tear would have made the area of the shoulder involved more prone to injury (R. 77).

STATEMENT OF POINTS

POINT I

THE COURT DID NOT ERR IN SUBMITTING THE QUESTION OF CONTRIBUTORY NEGLIGENCE TO THE JURY.

POINT II

THE JURY WAS JUSTIFIED IN ALLOTING

THE NEGLIGENCE BETWEEN THE PLAINTIFF
AND DEFENDANT AS IT DID.

POINT III

THE AMOUNT OF DAMAGES AWARDED WAS
NOT INADEQUATE.

ARGUMENT

POINT I

THE COURT DID NOT ERR IN SUBMITTING
THE QUESTION OF CONTRIBUTORY NEGLIGENCE TO THE JURY.

The plaintiff bases his argument that the court erred in submitting the issue of contributory negligence to the jury on two points:

(1) That defendant relied on the principle of assumption of risk rather than contributory negligence; and

(2) That the only contributory negligence claimed by the defendant is that plaintiff elected to board the car in a dangerous place when he could have boarded in a safe place.

With regard to plaintiff's first point defendant denies that its case is in any way founded or dependent upon the doctrine of assumption of risk. Defendant agrees with plaintiff that "Every vestige of the doctrine of assumption of risk was obliterated from the law by the 1939 amendment" to the Federal Employers Liability Act, (*Tiller vs. Atlantic Coast Line Railroad Company*, 318 U.S. 54, 87 Lawyers Ed. 610). As admitted by plaintiff in his brief (P. 23) the court "Instructed the jury that assumption of

risk was not a defense and that the burden of proving contributory negligence was on the defendant."

Consequently, defendant submits that none of plaintiff's cases with regard to assumption of risk are in point. Defendant relies, as will be demonstrated hereafter, on specific acts of negligence on the part of plaintiff to sustain its position that the plaintiff was contributorily negligent and that the court was bound to submit the issue of contributory negligence to the jury.

With regard to plaintiff's second claim, the defendant does not rely alone on plaintiff's selection of a place to board the car as his only act of contributory negligence. That was only one of several acts on his part which could be construed by reasonable men acting on a jury as constituting negligence. Following are the acts appearing in the record which reasonable jurors could conclude to be negligent:

1. Jurors might reasonably have believed that the plaintiff could and in the exercise of reasonable care should have selected a safer place to board the car because:

(a) Plaintiff knew there were gouge marks left by the clam shell which could constitute a hazard unless he watched his footing carefully;

(b) There is evidence there was only a "light skiff of snow" on the ground (R. 31);

(c) Plaintiff claimed the gouge mark involved was eight to twelve inches deep (R. 43);

(d) The gouge marks were three to five feet apart (R. 23).

Members of the jury could reasonably have concluded that a hole eight to twelve inches deep could and should have been seen by the plaintiff if there was only a light skiff of snow on it; indeed, they could ask, how did the plaintiff know it was eight to twelve inches deep if it was not capable of being observed; and inasmuch as there were areas three to five feet wide without holes or gouge marks, he had plenty of opportunity to stand in areas of safety to board the car and did not have to stand on the edge of a hole.

2. The plaintiff admitted in his testimony that it was customary to take hold of a grab iron with both hands and distribute the task of pulling oneself up onto the car between both hands. On page 58 of the Record, plaintiff was asked by counsel "When you reached up, what was the usual way to do it, put the weight on one hand?" and the plaintiff answered "Most generally put the weight on both hands." Members of the jury may reasonably have concluded that the plaintiff was negligent in this instance in grabbing with one hand and imposing all of the initial strain on that one arm, his left, rather than using both arms, especially when the plaintiff was conscious of the fact that his left shoulder was weak from previous dislocations.

3. The jury may have disbelieved the plaintiff when he stated that "I stepped into a hole" because they may have realized the obvious fact that with one foot elevated in the stirrup of the car, it would be impossible for plaintiff to take a step with the other foot and therefore he must either have (a) missed his hand hold; or (b) slipped on the skiff of snow and fell because he negligently failed to acquire a firm grip on the grab iron—a grip sufficient

to stand the strain of pulling him up off the ground and onto the car.

4. The members of the jury may reasonably have believed that the plaintiff carelessly got a foot in the stirrup before he took a firm grip—or any grip at all with his hand—and as a result lost his balance and slipped and fell.

5. The jury may reasonably have concluded it was negligent for plaintiff to attempt to board the car from an area of rough footing when he could have walked alongside the car and performed his duties. Mr. Sprunt claimed that he had to board the car so that he could give signals to the engineer. However, the jury may not have believed that in light of the fact that Mr. Patterson, the other switchman, testified that he, Patterson, was riding the head end car of the seven or eight car cut (R. 20), that is, the car farthest from the engine (the cars were being backed toward the hopper) and he, Patterson, gave the signal to the engineer to make the backward movement and to stop the movement when he saw the plaintiff lying on the ground. Therefore, according to Patterson's testimony he, Patterson, was where the engineer could see him and he being on the lead car would be the man to give the signal when to stop the cut in the vicinity of the hopper. In other words, in spite of the plaintiff's statement, it does not appear from the Record that the plaintiff would have been the man to give the signal, for he would have been riding on the east side of a car about halfway between the end of the cut and the engine. He would have been in no position to know when the stop signal should be given to the engineer to stop the cut when the cars were properly lined up for the hopper (R. 20).

6. The plaintiff states in one place in the record that he was standing still when he attempted to board the car. In another place he says he stepped in a hole. With this conflict in his account of the incident, members of the jury could reasonably have concluded that he was walking immediately before he attempted to board or that at least he took one step before or as he attempted to board and that he simply didn't observe with due care where he was stepping and that the careless step resulted in the slip and the fall.

7. Members of the jury might have reasonably concluded that the alleged hole had nothing to do with the fall; that the plaintiff didn't slip or step into a hole, because on page 59 of the record, plaintiff testified as follows:

"Q. As you reached with your left hand, as you started to board, your foot went in a hole?

"A. No, generally when you are boarding a car you swing yourself on, when I went to swing on I slipped."

Earlier on page 43 of the record, the plaintiff said:

". . . it was done so quick I don't know how I fell."

Consequently members of the jury could reasonably have concluded that the cause of this accident was that the plaintiff did not step with due care on the slippery snow on the ground and because of his lack of care simply slipped on the snow and the hole had nothing to do with it.

The seven items above are all examples of conduct on the part of the plaintiff documented in the record which the Jury could reasonably consider negligence. None of them have anything to do with assumption of risk. None

of them are dependent on or related to the assumption of risk doctrine.

In light of the above decisions that might have been made by reasonable men acting on a jury, let us take a look at the law applicable.

Defendant will borrow from one of the cases cited by the plaintiff in his brief to restate a well established principle of law. The case is *Anderson vs. Nixon*, 139 P.2 216, a Utah case decided in 1943.

“For the purpose of determining whether the evidence was sufficient to sustain plaintiff’s contentions, the jury having found in his favor, this court will consider as true where there is any conflict in the evidence that which is most favorable to plaintiff’s position.”

What is good for the goose is good for the gander in determining whether or not an issue of negligence or contributory negligence should be submitted to the jury. The above language from the *Anderson* case can be accurately paraphrased to apply in this case where the defendant is contending that the issue of plaintiff’s contributory negligence was properly submitted to the jury.

“For the purpose of determining whether the evidence is sufficient to sustain defendant’s contention that plaintiff was contributorily negligent, the jury having found in defendant’s favor, this court should consider as true, where there is any conflict in the evidence, that which is most favorable to the defendant’s position.”

In the case of *Stickle vs. Union Pacific Railroad Company* 251 P. 2 867 (1952 *Utah*), Justice Crockett suc-

cinctly stated the position which the defendant takes in the case at bar.

"It should be kept in mind that so far as the quantum of proof necessary to take the question of contributory negligence from the jury is concerned, the tests are the same as with respect to primary negligence."

Later the court said:

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

"Courts, as final arbiters of law, could arrogate to themselves arbitrary and dangerous powers by presuming to determine questions of fact which litigants have a right to have passed upon by juries. Part of the merit of the jury system is its safeguarding against such arbitrary power in the courts. To the great credit of the courts of this country, they have been extremely reluctant to infringe upon this right, and by leaving it unimpaired have kept the administration of justice close to the people."

Justice Crockett went on later to say in the same opinion:

"A very fine statement of the proper attitude toward this right was expressed for this court by the late Mr. Justice Frick in *Newton vs. Oregon*

Short Line R. Co. where, in referring to the question of submitting plaintiff's contributory negligence to a jury, he made these statements:

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

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

In the case of *Rogalski vs. Phillips Petroleum Company*, 282 P. 2 304 (1955 Utah) which was a master and servant case, Justice McDonough speaking for the court said in the opinion:

"It has been frequently announced by this court that contributory negligence is a question for the jury unless all reasonable men must draw the same conclusion from the facts as they are shown. *Shafer v. Keeley Ice Cream Co.*, 65 Utah 46, 234 P. 300, 38 A.L.R. 1523; *Lowe v. Salt Lake City*, 13 Utah 91, 44 P. 1050, 57 Am. St. Rep. 708; *Baker v. Decker*, 117 Utah 15, 212 P. 2d 679. As was said in *Linden v. Anchor Min. Co.*, 20 Utah 134, 58 P. 355, 358:

'Where there is uncertainty as to the existence of either negligence or contributory negligence, the question is not one of law, but of fact, and to be settled by a jury; and this, whether the uncertainty arises from a conflict in the testimony, or because, the facts being undisputed, fair-minded men will honestly draw different conclusions from them.' "

In the case which plaintiff relies on most in his brief, that of *Tiller v. Atlantic Coast Line Railroad Company*, 318 U.S. 54 (1943) the court clearly supports defendant's contention in this case that the issue of contributory negligence should be submitted to the jury whenever there are any disputed questions of fact. Inasmuch as this is admittedly such an important case, a statement of the facts would not be inappropriate. In the court's words, the facts were as follows:

" . . . Tiller (the plaintiff) was standing between two tracks in the respondent's switch yards, tracks which allowed him three feet, seven and one-half inches of standing space when trains were moving on both sides. The night was dark and the yard was unlighted. Tiller, using a flashlight for the purpose, was inspecting the seals of the train moving slowly on one track when suddenly he was hit and killed by the rear car of a train backing in the opposite direction on the other track. The rear of the train which killed Tiller was unlighted although a brakeman with a lantern was riding the back step on the side away from Tiller. The bell was ringing on the engine but both trains were moving. The Circuit Court found that it was 'probable that Tiller did not hear cars approaching' from behind him. No special signal of warning was given."

After eloquently disposing of the defense of assumption of risk, the court (Justice Black) said:

"No case is to be withheld from a jury on any theory of assumption of risk and questions of negligence should under proper charge from the court be submitted to the jury for their determination. Many years ago this court said of the problems of

negligence, 'we see no reason, so long as the jury system is the law of the land, and the jury is made the tribunal to decide disputed questions of fact, why it shouldn't decide such questions as these as well as others.' *Jones v. Tennessee, V & GR Company*, 128 U.S. 443, 445, 32 Lawyers Edition 478, 479. Or as we have put it on another occasion, 'where the facts are in dispute, and the evidence in relation to them is that from which fair-minded men may draw different inferences,' the case should go to the jury.

"We think that the question of negligence on the part of the railroad *and on the part of the employee* should have been submitted to the jury."

In the Utah case of *Cooper v. Evans*, 262 P. 2d 278 (Utah 1953), the principle of law is put in sharp focus by the fact that in that case the plaintiff claimed, as in this one, that she should have been determined by the court to be free of contributory negligence as a matter of law. This case is particularly helpful because some of the facts of it are strikingly analagous to some of the facts involved in the case at bar.

In the Cooper case the plaintiff received injuries in a fall over a portion of a merchandise platform owned by the defendants which juttet out into a walk-way in the defendants' store. The Trial court entered judgment for the defendants and the plaintiff appealed. In the trial court the judge had submitted an interrogatory for the jury to answer, asking whether plaintiff's failure to *observe and see* the platform amounted to contributory negligence. The jury answered the question in the affirmative and based on the jury's finding of contributory negligence, the court entered judgment for the defendants.

The court, in the case at bar, might very well have submitted a similar interrogatory to the jury, asking whether or not they believed plaintiff's failure to *observe and see* the hole in which he claimed he stepped, constituted contributory negligence.

In the Cooper case, the court said:

"It is to be noted that although the word 'observe' as used in the interrogatory could be given a meaning equivalent to 'make observation for,' the more usual understanding is to regard the words 'observe' and 'see' as synonymous. Under such meaning, in telling the jury that Mrs. Cooper failed to 'observe and see,' the court was only stating to them that uncontroverted fact, for Mrs. Cooper concedes that she did not see the obstruction. The court was aware that under the circumstances disclosed by the evidence, the conduct of Mrs. Cooper in failing to see the platform might, or might not, meet the standard of care required of her, and that the application of such standard is peculiarly within the province of the jury.

"Plaintiff is in error in her contention that the question of the existence of contributory negligence, under the situation which we here consider, is one of law. Contributory negligence would only be a question of law where the evidence showed, with such certainty that reasonable minds could not differ thereon, that the conduct in question either met or failed to meet the standard of due care. But where there is uncertainty as to whether such standard has been met so that reasonable minds could differ upon it, the question of whether such negligence exists is not a matter of law, but is one for the jury to determine."

Baker v. Decker, 212 P. 2d 679, Utah 1949, another

case cited in the plaintiff's brief, is, we submit, excellent authority to support defendants' contentions.

In that case plaintiff was walking along the second story hallway of the apartment house in which she resided when she fell over equipment deposited in the hallway by the defendant, a house cleaning company. This is a case in which the plaintiff had an election of choosing, more or less safe places to walk. She could have taken a route which was not usually traveled by her but which would have been safer because it did not have equipment over which she would have to step. The court held that both the issues of the negligence and contributory negligence should have been submitted to the jury.

On page 682 the court said:

"Under the facts and circumstances of this case, it was for the jury to determine whether or not plaintiff exercised due care and caution when she elected to continue down the hallway on the second floor rather than to proceed by a route not usually traveled by her."

Later in the opinion, in stating that the question of plaintiff's contributory negligence should have been submitted to the jury, the court said:

"The last contention to be disposed of deals with the claim that plaintiff was guilty of contributory negligence in stepping onto the canvas and catching her heel. We must keep in mind that the burden is upon the defendant to establish this claim and that unless all reasonable minds must conclude that Mrs. Baker was negligent in the manner in which she attempted to get over the canvas the question of her due care must be submitted to the jury for determination. We must

also keep in mind that this case falls within the category of cases dealing with pedestrians who are subjected to unnecessary hazards by the thoughtless conduct of others. Ordinary reasonable persons will trip over objects, stumble over obstructions, slip on slick surfaces and fall into holes or excavations. Even though they may see the object they sometimes fail to comprehend and anticipate the incident which precipitates the injury. *Usually whether a reasonable person would have properly appraised the situation and escaped injury is for a jury to determine.*" (Emphasis supplied)

The case of *Louisville and Nashville Railroad Company v. Morrill*, 99 So. 297 (Alabama 1924) treats both problems so vital to plaintiff in his brief in the case at bar. That is, the assumption of risk and the election of a safe, as against a dangerous, method of doing something. The opinion could not be more in point because it specifically declares that when such an election problem is involved it is a matter of negligence and not a matter of assumption of risk.

This case was brought under the Federal Employers Liability Act as that Act existed in 1924. Plaintiff's counsel will initially contend that the case is not helpful because it was decided before the 1939 amendment to the FELA. However, the facts and ruling will reveal that the decision of the court at that time is perfectly applicable to the case at bar. At that time assumption of risk could be a complete defense for the railroad. But contributory negligence was treated under the FELA in 1924 exactly as it is treated now. It was not a bar to recovery but only a source of diminution of damages. In the Louisville case, the railroad used assumption of risk as a defense, and as

an alternative, contributory negligence, hoping that the court would decide that plaintiff's conduct constituted assumption of risk. The court, however, decided that plaintiff's conduct did not constitute assumption of risk and might constitute contributory negligence, so the court submitted the issue of contributory negligence to the jury. The court, therefore, had to distinguish between assumption of risk and contributory negligence in relation to plaintiff's conduct and decided that issue as the plaintiff wanted it decided.

The facts were that the plaintiff alighted from a moving train, collided with another railroad employee and was knocked under the train and injured.

The railroad contented that plaintiff's collision with another employee was a part of the risk of working for a railroad which he could anticipate and that he assumed that risk. The court didn't go along with that theory. The court recognized from the evidence that the plaintiff had the election of alighting from the train when he did or waiting until it stopped, as it would have done shortly. The court, on page 299, said:

"The chief contention of the appellant (defendant railroad) is that the trial court confused contributory negligence with an assumption of risk and erroneously defined the conduct of the plaintiff, in the adoption of the more dangerous way to alight, as contributory negligence. We do not think that the trial court was in error in this respect. *If there are two ways in which an act can be done—one a safe way, the other a dangerous way—and the person who is doing the act chooses the dangerous way with knowledge of the danger,*

he is guilty of contributory negligence, and not an assumption of risk." (Emphasis supplied)

In the case at bar, the defendant's position is exactly what the court's position was in the Louisville railroad case. The defendant contends that there is evidence that plaintiff elected to do some things the dangerous way when he could have done them a safer way and the defendant did not, and does not, contend that assumption of risk has anything to do with it, but that plaintiff's conduct constituted contributory negligence. As pointed out earlier in this brief, the jury had these facts to consider: the plaintiff could have elected to use two hands instead of one as he attempted to board the train; he chose to use one. The plaintiff could have selected a safer place to stand, that is, a place in one of those three to five feet areas where there was no hole; instead of on the edge of a hole. The jury might also have concluded that the plaintiff could have elected to walk beside the train instead of boarding it when boarding it constituted some danger due to the uneven footing with which he was well acquainted. Inasmuch as the jury could have decided that he was walking or at least taking a step or two immediately prior to his attempt to board, the jury would have been justified in concluding that he should have elected to stand still, on solid smooth footing before he made his attempt to board.

All of these elections available to the plaintiff and submitted to the minds of the jurors only substantiate defendant's contention that the issue of plaintiff's contributory negligence was properly submitted to the jury for determination.

In the case of *Dickson v. Virginian Railway Company*, 250 F. (2) 460 (4th Circuit, 1957), the court put the argument well in these words:

" * * * As this court recently said in *Atlantic Coast Line Railroad Company v. Truett*, 4th Circuit, 249 F. (2) 215, 217, 'distilling the essential truth from a raw mixture of circumstances is the fact finder's function, and the jury is the instrument our system provides for this purpose.' Courts are, and should be, astute not to substitute their judgment on issues of fact for that of juries when different inferences may be reasonably drawn from the evidence."

In the FELA case of *Wilkerson v. McCarthy*, 336 U. S. 53, a case arising out of Utah, Justice Douglas, reviewing all FELA cases decided by the court for the preceding ten years, said this:

"The criterion governing the exercise of our discretion in granting or denying certiorari is not who loses below but whether the jury function in passing on disputed questions of fact and in drawing inferences from proven facts has been respected."

POINT II

THE JURY WAS JUSTIFIED IN ALLOTING THE NEGLIGENCE BETWEEN THE PLAINTIFF AND DEFENDANT AS IT DID.

There is in the record substantial evidence to justify the jury's determination that two-thirds of the fault in connection with this accident was attributable to the plaintiff's negligence. One view the jury may properly have taken was that there was very little negligence on the part

of the railroad. The jury may have reasonably concluded from the evidence there was little, if anything, the railroad could do about keeping the Vitro Chemical Company yard carpet smooth for its switchmen to walk on in light of the nature of the operation that was involved. This unloading of ore cars along the side of the track was a continuous and necessary operation. The work had to be done as long as Vitro continued to operate and the railroad continued to deliver ore. The ore had to be dumped, picked up with a clam shell bucket and stacked in piles. There is no evidence that there was any other or better way to do it. If the railroad had had time between loads and had devoted an "army" of men to the job of cleaning up and grading and leveling and smoothing the area after each cut was unloaded, the area would have been cluttered and roughened again with each group of cars that were brought in. It was a work area. The men knew this. There was no way of avoiding it and still continuing the operation.

The plaintiff's own witness, Mr. Rask, under examination by plaintiff's own attorney clearly and honestly described the situation:

"Q. It is necessary to keep it rough?

"A. It is impossible to keep it otherwise with a continuous operation of those cars.

"Q. You couldn't keep it up with a shovel as you do with men in your area?

"A. If they had an army of men, but not for each continuous operation.

"Q. What do you mean by continuous operation?

"A. Dumping one car and another one on top, that is a continuous operation all day long." (R. 137).

Plaintiff's counsel was trying to get his witness to compare this work area in a private yard with non-work areas in railroad yards where the ground adjacent to the tracks was maintained in smooth condition with shovel and rakes. His witness was truthful and revealed the necessary difference that had to exist if the work was to be done.

Perhaps defendant's counsel erred in not cross appealing and asking this court to reverse the lower court for not granting defendant's motion for a directed verdict, for it is still defendant's belief that there was no negligence on the part of the defendant railroad. However, believing that inasmuch as it has been so well and thoroughly established in FELA cases that weighing and evaluating the facts is the province of the jury, the defendant considered it futile to cross appeal in spite of the lack of evidence of negligence on the part of the defendant.

If members of the jury considered the conduct of the railroad in the light of proper instructions as to negligence given it by the court, then the jury was certainly justified in concluding the negligence of the railroad was minimal.

Defendant's negligence is certainly doubtful under the language of Justice Frankfurter in his concurring opinion in the plaintiff's favorite case, *Tiller v. Atlantic Coast Line Railroad Company*, supra. Justice Frankfurter said:

"By specific provisions in the Federal Employers Liability Act, it has swept away 'assumption of risk' as a defense once negligence is established, but

it has left undisturbed the other meaning of 'assumption of risk,' namely, *that an employee injured as a consequence of being exposed to a risk which the employer in the exercise of due care could not avoid is not entitled to recover, since the employer was not negligent.*" (Emphasis supplied)

Later in the opinion, Justice Frankfurter said:

"The basis of an action under the Act remains the carrier's negligence. The carrier is not to be relieved from the consequences of its negligence by any claim that the employee 'assumed the risk' of its negligence. *But neither is the carrier to be charged with those injuries which result from the 'usual risks' incident to employment on railroads—risks which cannot be eliminated through the carrier's exercise of reasonable care.*" (Emphasis supplied)

Defendant submits that the rough condition of the Vitro Chemical yard was a condition which could not be eliminated through the carrier's exercise of reasonable care, and that therefore the defendant was not negligent at all. However, the matter was submitted to the jury, the jury decided there was some negligence on the part of the railroad, and we will abide by that decision.

The writer has already described in the discussion of the previous point the negligence of the plaintiff, and comparing that with the negligence of the railroad, it certainly appears there is substantial evidence to justify the jury in apportioning the negligence as it did.

In the case of *Williams v. Ogden Union Railway & Depot Company*, 230 P. (2) 315, (Utah, 1951), an FELA case involving among other issues the one of excessive

damages, the court made a statement which is equally applicable to the issue of inadequate damages:

"The power to require remissions should not be used as a sword to require minor variations in the proportions of contributory negligence to negligence * * * Jury verdicts need not be tailored to exact specifications."

All of the cases cited under the discussion of Point I with regard to viewing the evidence in the light most favorable to the defendant and with regard to honoring the right of the jury to weigh the evidence are also applicable in the discussion of Point II.

POINT III

THE AMOUNT OF DAMAGES AWARDED WAS NOT INADEQUATE.

Plaintiff contends that the verdict of \$15,000.00 awarded to the plaintiff before diminution for contributory negligence was inadequate.

Plaintiff avoids facing squarely the statutory grounds upon which a demand for a new trial for inadequate damages is based, to-wit, *Rule 59 (a) (5), Utah Rules of Civil Procedure*, which reads as follows:

"Excessive or inadequate damages appearing to have been given under the influence of passion or prejudice."

In other words, in the rule granting of a new trial for inadequate damages is tied to passion or prejudice.

Plaintiff in his brief makes no contention that the jury entertained any passion or prejudice against the plain-

tiff, and indeed there is no evidence whatsoever to indicate that they felt anything but the normal sympathy toward an injured plaintiff.

The jury was properly and adequately instructed on the subject of damages and plaintiff's counsel quite properly has and makes no complaint with regard to that.

In *Saltas v. Affleck*, 99 Utah 381, 105 P. (2) 178, a case involving the propriety of granting a new trial for inadequate damages, the court said:

"It is seldom that the amount of the verdict, standing alone, is so inadequate or excessive as to indicate passion or prejudice." (Citing *Miller v. Southern Pacific Company*, 82 Utah 46, 21 P. (2) 865).

In *Hirabelli v. Daniels*, 44 Utah 88, 138 P. 1172, the court said:

"As said by some courts, juries, in cases of tort, are more prone to over estimate than under estimate damages, and for that reason trial courts have more often been justified in interfering with verdicts on the grounds of excessive damages than on the grounds of inadequate damages."

It should be recalled that plaintiff's counsel moved for a new trial on the same grounds as those set forth in his brief, including the issue of inadequate damages; that a hearing was held, the matter argued before the trial court, and the trial court, who had the opportunity of hearing the evidence and observing the witnesses and the jury, refused to grant a new trial.

In *Eleganti v. Standard Coal Co.*, 50 Utah 585, 168 P. 266, the court said:

"The mere fact that the verdict of a jury may be excessive is not alone sufficient to show that it is the result of passion or prejudice.

"The criteria is the same for inadequate damages as for excessive damages. (Emphasis supplied) No distinction is made between the granting of a new trial because of excessive damages and the order of a new trial by reason of the fact that the damages awarded by the verdict are inadequate. 39 Am. Jur., New Trial, Sec. 145, p. 151."

In *Duffy v. Union Pac. R. Co.*, 118 Utah 82, 218 P. (2) 1080, (1950) the court said:

"Previously decided cases are of little value in fixing present day standards or in assisting courts in determining excessive awards. Both the court and jury are required to deal with many unknown factors and a good guess is about the best that can be hoped for. The *permissible minimum and maximum limits* within which a jury may operate for a given injury are presently *far apart* and must continue to be widespread so long as pain and suffering must be measured by money standards. If the jurors award damages which all reasonable persons would conclude were not outside permissible limits, we cannot invade their province by substituting our judgment for theirs, but when we believe that all reasonable minds would conclude the limits have been exceeded we are permitted to correct the error." (Emphasis added.)

There is also another factor which the jury and this court may properly take into consideration in determining whether or not damages are adequate. *In cases of doubtful liability, a court should not upset a verdict on the grounds of inadequate damages.*

This is not a new or novel principle. It has been recognized in many cases. In *McDowell v. City of Portsmouth*, 35 S. E. 821 (Va.), it was held that if the evidence preponderates in the defendant's favor on the question of liability a new trial is not to be granted for inadequate damages, *even though it is sufficient to support a verdict that defendant is liable*. The court quoted with approval the language used in *Rawle v. McIlhenny*, 177 S. E. 214, 98 A.L.R. 930, where it was said:

"The right of a plaintiff to have a verdict in his favor set aside, over the objection of the defendant, on the ground of inadequacy, does not depend solely upon the evidence bearing upon the damage he has suffered. Both the apparent cause for the return of an inadequate verdict and the state of the evidence relative to the liability of the defendant have an important, and to a considerable extent interacting bearing upon the plaintiff's right to have the verdict set aside."

In *Olek v. Fern Rock Woolen Mills*, 180 F. 117, an employee brought suit against his employer on the grounds that the defendant had negligently furnished the plaintiff an unsafe place to work. The plaintiff recovered a verdict for \$250.00. Motion for a new trial on the grounds of inadequate damages was denied. The court said:

"There was sufficient evidence of defendant's negligence to carry the case to the jury, but in the judgment of the court the great weight of the evidence was against the plaintiff's right to recover anything."

In *Burkitt v. Vail*, 215 P. 887 (Ore.), plaintiff recovered damages of \$1.00 on account of negligent damage

to a truck. A motion for a new trial on grounds of inadequate damages was denied. On appeal the supreme court held that a new trial was properly denied and said:

"The evidence in the instant case was such that the jury could reasonably and properly have returned a verdict for the defendant."

In *Cochran v. Wilson*, 229 S. W. 1050 (Mo.), the plaintiff sought a new trial on the grounds that the damages awarded her were inadequate. It was a suit for personal injuries in which she had recovered a verdict in the sum of \$250.00. In affirming the lower court, the Supreme Court of Missouri recognized appellant's right to have a verdict set aside for either an excessively large or ridiculously small amount where the result indicated passion and prejudice on the part of the jury. The court said that in passing upon such questions the presumption is in favor of the good conduct of the jury and "if upon the whole record the case preponderates in favor of the defendant, *or the testimony is evenly balanced*, the courts will refuse to interfere with nominal verdicts, although at first view they may appear illogical." The court approved the idea, that the reason for holding tenaciously to damages found by a jury in personal injury cases is that in this class of cases there is no scale by which the damages may be graduated with certainty. "The damages admit of no other test than intelligence of the jury, governed by a sense of justice."

A review of our discussion under Point II may indicate to the court that the members of the jury might properly have been influenced to some extent in their award of

damages on the realization that there was little, if any, negligence on the part of the railroad.

However, whether that was in their minds or not, defendant, submits that the \$15,000.00 verdict was substantial and thoroughly adequate in light of the fact that plaintiff is in good health other than the trouble he is having with his shoulder, and that it was obvious to the jury that there are many types of work that he could do, and that he would not be confined to the job of driving a cab or limited to an income of \$90.00 a month.

CONCLUSION

Bearing on all three points discussed in this brief, are a recent decision of the Utah Supreme Court and a much quoted decision of the United States Supreme Court.

In *Horsley v. Robinson*, 186 P. (2) 592 (Utah 1947), Justice Wade's language, we submit, wraps up the argument covering all issues raised in the plaintiff's brief:

"Since the trial court is not required to submit special interrogatories and therefore we do not know how the jury in fact did determine the controlling issues we must presume that they found the facts necessary to support their verdict if the evidence was sufficient to sustain such a finding. Thus we must view the evidence in its most favorable aspect to support the verdict which the jury has rendered and if from the evidence the jury could reasonably find facts necessary to sustain their verdict it must be sustained. This is true, even though had we been the triers of the facts we would have found them differently, or even though we may not believe that the jury did in fact so find or,

even though we believe that such a finding would be against the great preponderance of the evidence.

“(1) Under a general verdict we cannot be assured what facts the jury found or that they found the facts necessary to sustain their verdict. So it is universally held under the common law system, as it must be in order to give stability to jury verdicts, that the appellate court must sustain the verdict where the evidence is sufficient to support a finding of the necessary facts to do so. Otherwise, the appellate court would be required to reverse every verdict where in its opinion the great preponderance of the evidence is against a finding of the necessary facts to support it, even though the evidence is such that reasonable minds might conclude from the evidence that such necessary facts happened. To do so would be to review the evidence no matter what we call it. The question of what were the facts and where is the preponderance of the evidence is for the jury and not for the court to determine. Our problem is only to determine whether there is sufficient evidence to sustain the verdict. In doing so our standard is: Could a reasonable mind be convinced by the evidence of the necessary facts to support the verdict? If so, it must be sustained.

“That this court is not authorized to review the facts found by the jury is expressly provided by our Constitution, Article 8, Section 9, where it is provided ‘In cases at law the appeal shall be on questions of law alone.’ Since we cannot review the facts, whatever we think of where the preponderance of the evidence is, is immaterial. If we were to review the evidence and reverse this case because we think the preponderance of the evi-

dence on a material issue is against the plaintiff, we do so in violation of that constitutional provision.”

In the FELA case of *Tennant v. Peoria & P. U. Ry. Co.*, 321 U. S. 29, one of the leading and frequently cited cases on this question, wherein the lower court had set aside a jury verdict, the Supreme Court of the United States said:

“No court is then justified in substituting its conclusions for those of the twelve jurors.

* * *

“It is not the function of a court to search the record for conflicting circumstantial evidence nor to take the case away from the jury on the theory that the proof gives equal support to inconsistent and uncertain inferences.

* * *

“Courts are not free to *re-weigh* the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or *because judges feel that other results are more reasonable.*” (Emphasis supplied)

Defendant submits that the jury’s verdict in the case at bar should not be disturbed.

Respectfully submitted

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