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Parley D. Bills v. Denver & Rio Grande Western Railroad Co. : Brief of Respondent

Utah Supreme Court

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In the
Supreme Court of the State of Utah

PARLEY D. BILLS,
Plaintiff and Appellant,

vs.

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY,
a corporation,
Defendant and Respondent.

Case No.
9028

BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

Plaintiff commenced this suit to recover for alleged injuries sustained when he fell in a caboose of defendant's freight train. He alleged that the fall was caused by negligence of the defendant in subjecting the caboose "to an unusually violent jerk * * * which, by its nature, was not reasonably to be expected by plaintiff" (R. 2). Defendant also alleged res ipsa loquitur. The pretrial order limited the contentions of negligence to those alleged and

the case was tried and submitted on the said theory of negligence set forth in the complaint (See Pretrial Order R. 5; Plaintiff's Requested Instructions R. 8; and Instructions of the Court R. 28-56). The jury returned a verdict of "no cause of action." Judgment was entered on the verdict and a motion for new trial denied. This appeal followed.

STATEMENT OF FACTS

Plaintiff's statement of the facts is substantially correct as far as it goes. There are additional facts, however, which should be before the Court in considering the law questions raised on this appeal. The defendant earnestly contended at the time of trial and now contends that there was no evidence of negligence on the part of the Railroad and that the trial court should have directed a verdict. The defendant's position will be clear when the Court is furnished a little background regarding the nature of the equipment and operations which were involved in the case.

The plaintiff at the time of the accident was riding in the caboose of an 89 car train. He was the conductor or foreman in charge of the train (R. 143). The train was engaged in switching operations in the Provo yard. The defendant's employees were making up a train which was to move south on defendant's line to Thistle. In the course of stopping the train on a switching move, the caboose received a jerk caused by "slack" action. Plaintiff contends that this was "an unusually violent jerk * * * which by its nature was not reasonably to be expected by plaintiff" (R. 2). Plaintiff's own evidence shows that jerks

caused by slack action in switching moves are unavoidable; that this was not an "unusual" jerk, and that such jerks are to be expected in moves of this kind. In explanation of what happened in this case, the evidence of both parties demonstrates the following:

(1) The couplers of freight cars (unlike passenger cars) are relatively loose. There are 6 to 12 inches of play in each coupling so that on a train of 90 cars there would be 45 to 90 feet of play. Thus in starting from a standstill position an engine on such a train might move 2 car lengths (R. 219) before the caboose on the end of the train even starts to move. On a train of 90 cars, the caboose would be approximately 1 mile behind the locomotive.

(2) In stopping a freight train the slack tends to be taken up by "bunching" of the cars toward the head end of the train. On short, slow moves on level ground, such as are involved in switching moves, there is always "slack" action when a train is brought to a stop because the engine and first cars in the train stop before the train is "bunched" and the cars to the rear "run into" the stopped cars causing an abrupt stop on the rear end of the train.

(3) Trainmen are always expecting this slack action during switching moves and they are schooled to take preventative action to avoid injury to themselves. It is not a question as to whether or not there will be slack action. There always is in a move such as was involved in this case. Trainmen know that the slack action may be comparatively mild or very severe

and that the slower and shorter the move and the longer the train the more severe the slack action will be.

(4) Slack action may be diminished by application of the train brakes (which brake the cars attached to the train) as opposed to the independent brakes (which brake the engine only), but on an 89 car train the brakes on the rear cars of the train are not actuated until 30 seconds after air is applied in the engine and on a short move it is impossible to prevent slack action because the brakes toward the rear end of the train do not take effect before the stop.

In the light of this background of fact, the Court should consider the following testimony from plaintiff himself and the witnesses called on his behalf.

The plaintiff testified:

(R. 151)

"Q. * * * In freight trains, and particularly long freight trains, there is a great opportunity for the cars to run in and bunch up and cause slack action, is there not?

"A. Yes, sir."

(R. 153)

"Q. * * * Isn't it a fact that you usually try and stay off the cabooses until the train does leave town, to avoid slack action?

"A. Generally, that is true.

"Q. Well, then, generally if you stay off of the cabooses to avoid slack action, you generally anticipate and expect slack action, don't you, Mr. Bills?

"A. We expect slack action at times, and are always tense and ready for slack action, to a normal degree.

"Q. Well, as a matter of fact, in railroading with moving freight cars, you anticipate and expect slack action all the time, do you not, Mr. Bills?

"A. Yes.

* * * * *

"Q. * * * Don't you have a sign on the caboose that says what you should do in order to protect yourself against slack action?

"A. We have a sign in the caboose that said that to be prepared for slack action, especially at terminals and entering stations.

"Q. The sign says 'Be prepared for slack action, especially in going in and out of sidings.'

"A. Yes, sir.

"Q. And in other words, on a caboose, you are supposed to be prepared for slack action all the time, are you not, Mr. Bills?

"A. That's right."
(R. 163)

"Q. Actually, of course what the men had to do was to pick up, to stop the train 20 carlengths back and put in some other cars for Thistle.

"A. Yes, that's right.

"Q. And that is normal and usual that actions like that occur when you are engaged in making up a train, is it not?

"A. Yes, sir.

"Q. And trains will frequently stop in yard limits, will they not?

"A. Yes, sir.

"Q. To do the very sort of thing that happened here, isn't that right?

"A. Yes."

The plaintiff then testified that he mistakenly thought the train was made up and leaving town but when asked if he was unprepared for slack action for this reason he said: "Like I say, we are always expecting slack action" (R. 164). He then acknowledged his acquaintance with the railroad safety rule which provides that "employees must protect themselves against injury, as far as possible, from jerks, slack action * * * or any other unexpected motion by keeping a firm grip and secure foothold when riding on or in moving equipment" (R. 165). The examination of plaintiff continued as follows:

(R. 170)

"Q. * * * You wouldn't want to have this jury believe that there are not occasions when there is violent slack action back in a caboose.

"A. There is lots of occasions.

"Q. Yes, lots of occasions.

"A. Yes.

"Q. And it's the sort of thing you have to protect yourself against, and expect, is it not, Mr. Bills?

"A. Yes, sir."

* * * * *

(R. 171)

"Q. * * * You told Mr. West that this [violent] slack action wasn't unusual.

"A. That's right.

"Q. And it wasn't unusual.

"A. Not to the extent that it does happen quite often.

"Q. So that this kind of slack action which you got on this occasion happens frequently?

"A. I wouldn't say frequently, but—

"Q. Well, quite often, then?
"A. Quite often, yes.

"Q. All right. And so that you can expect that kind of slack action.
"A. Yes."

Plaintiff, referring to the slack action involved in this case said it was "severe" but "not unusual" (R. 154). His written and signed statement given only a few days after the accident was as follows:

> "* * * This slack run-in was severe, but not unusual. We have slack run-in like this practically every time a stop is made with a long train. The longer the train, the more severe slack action we get. If I had known this stop was to be made I would have been prepared for it. If I had remained at my desk I probably would have had the wind knocked out, but would not have injured my back.
>
> "I would not say there was any mishandling of the engine or train at all. This same move is made at Provo on almost all locals that go east, and I have handled work in this same way hundreds of times. We do the work differently, depending on what the men decide when they go to cut the thru cars in behind the shorts. Sometimes they cut them in before we pull up, so when the start is made we just continue out of town, and other times they handle it in the manner done on this date. Either way is proper and usual.
>
> "I presumed that the thru cars had been cut in before they started moving with the caboose.
>
> "There was nothing wrong with the caboose, and nothing wrong with the handling of the train and engine. Reason for this accident was the slack action, and the fact that I presumed they were leaving town.

"* * * I don't think there is any way to prevent slack action in a move of this sort. Our speed was only about five miles per hour before the slack ran in, which is ordinary for this move.

"This slack run-in was severe, but really not unusual. * * *"

(Exhibit 12, See R. 155-163.)

Regarding whether the train brakes or the independent brakes were used to effect the stop, plaintiff's testimony was uncertain. He acknowledged that on a short move necessitating a quick stop the use of either the train brake (service application) or the independent brakes would result in violent slack action (R. 179). He was then asked:

(R. 180)

"Q. And you don't, therefore, know whether he made an independent application or a service application.

"A. I can't say definitely."

Plaintiff called the Brakeman, J. E. Wonnacott. Wonnacott related the type of move that was being made (R. 208-224). The train was to be moved 20 car lengths and then stopped. The engineer had to rely on signals from the brakeman and the move and stop had to be made within a given distance in order to accomplish the purpose of it. Then regarding the impossibility of preventing slack action in such a move, Wonnacott testified as follows:

(R. 223-224)

"Q. He [the engineer] wouldn't be free to travel as far as he wanted to before he stopped, would he?

"A. No; because he was supposed to operate on signal.

"Q. And if he got a signal here from Serassio to stop, his job was to bring the cars to a stop as quickly as he can.

"A. That's right.

"Q. And that's what he did.

"A. Yes, sir.

"Q. That's what he was supposed to do, wasn't it?

"A. Yes.

"Q. Well, now, when you bring a cut of cars, a long string of cars, to a quick stop, and the slack is streached out, you get slack action, don't you?

"A. Yes.

"Q. Do you know any way to avoid that?

"A. No.

"Q. There isn't any way to avoid it, is there?

"A. Not to my knowledge.

"Q. And when you get cars strung out, particularly at a slow speed, and they move up, and the cars stop on the signal of a brakeman, why, that means that that slack has got to run in as that train is brought to a stop, does it not?

"A. Yes.

"Q. And that means slack action.

"A. Yes.

"Q. And very often, severe slack action.

"A. Yes."

Wonnacott testified that a service application would take thirty seconds to get air to the rear end of the train (R. 230). He did say that in his opinion an independent application had been made, but he was in no wise qualified to

express such an opinion and the trial court properly sustained defendant's objection to counsel's question calling for Wonnacott's opinion as to whether or not the train on this occasion could have been stopped with less violent slack action (R. 231).

The rear brakeman, Frank Serassio, also testified for the plaintiff. He had control of the move. The objective of the move was to place the train some 20 car lengths ahead and stop at a given point (R. 242). Serassio gave the stop signal and the engineer stopped the train "right where I wanted him to stop" (R. 246). In other words, the engineer executed the very stop which Serassio wanted and "expected" (R. 246). Regarding the slack action which accompanied the move, Serassio testified as follows:

(R. 247)

"Q. Now, Mr. Serassio, you, of course, have been familiar with the movement of trains, and the effect of slack action, over the years, have you not?

"A. Yes, sir.

"Q. And slack action is a common thing?

"A. It is.

"Q. You expect to see it often, don't you?

"A. Well, you do, yes.

"Q. And you do see it frequently, quite honestly, don't you, Mr. Serassio?

"A. You do.

"Q. Every time the cars are bunched in, and you string them out and stop them, they have to run back in, don't they?

"A. That's right.

"Q. And when they run back in that causes a slack action, doesn't it.

"A. That's right.

"Q. And the longer the train, the greater the slack action.

"A. Yes, sir.

"Q. And the slower the speed, the greater the slack action.

"A. That's right.

* * * * *

"Q. And you gave him the stop sign.

"A. That's right.

"Q. And he stopped.

"A. That's absolutely right.

"Q. But my point, Mr. Serassio, is, that that is the very situation where you get violent slack action.

"A. That's right."
(R. 252)

"Q. Well, slack action is something you very commonly run into in railroading, isn't it?

"A. Well, you have it all the time.

"Q. Surely. And, as a matter of fact, the worst place for it is back on the caboose.

"A. That's right.

"Q. And as a result, you have signs up on the caboose warning you about slack action, don't you?

"A. Well, it—There is signs in the caboose telling you to be braced for it, yes."

Serassio testified that severe run-ins are not uncommon (R. 254). Regarding the use of the independent as opposed

to the service or train brake, Serassio thought that there had been an application of the former. He was 1 mile behind the engine, however, and in no position to judge.

As opposed to the plaintiff's evidence, the defendant called the locomotive engineer of the train, Emil O. Kroescher. Kroescher is a locomotive engineer of over twenty years' experience. He testified as to the different methods of braking, stating that when operating a string of cars on a long train the locomotive engineer uses the train brake or service application. In this case he made a service application (R. 296). Serassio had testified that he gave the signal to stop approximately 3 or 4 car lengths before the train stopped (R. 244). Confirming this, the engineer stated that the train would stop within 3 car lengths with a service application and that had the independent brake been used it would have taken 6 to 7 car lengths. He also testified that there was always slack action in moving a train having as many cars as was on this train (R. 305). His action was in every way in accordance with the direction of the brakeman and the custom and practice of the industry. The resulting slack action was the normal and usual consequence of a stop of this type.

Defendant also called its road foreman of equipment, Mr. Benjamin Harrison Wagner, whose duty it is to supervise, promote, examine and educate engineers and firemen. He himself was an engineer and fireman of 41 years' experience and for the past 16 to 18 years has made special studies and tests regarding brakes on diesel engines (R. 311-312). He explained to the jury how the different types of brakes on a locomotive engine work. Wagner confirmed

the plaintiff's evidence that on a service application there would be no brake application to the rear of the car for 30 seconds after the brakes had been applied in the locomotive (R. 316). His testimony was thai there are 5 to 6 inches of slack in couplers on a freight car and that with 2 cars coupled together, there would be 10 to 12 inches of slack, indicating that on a train of 90 cars there would be approximately 90 feet of slack or play in the entire string (R. 317). His testimony substantiated that of the engineer that had the independent brake been applied the train could not have possibly been stopped in less than 6 car lengths (R. 319-20). The service application in the normal and usual manner would have stopped the train within 2½ to 3 car lengths (R. 320). Considering the length of the train and the distance of the move, his expert testimony indicated that there was no way this particular move could have been made without severe slack action (R. 322-326).

At the trial the plaintiff placed the sole blame for the accident on the engineer who he claimed made an improper brake application (R. 197). There was no claim made that the move itself was uncessary and unreasonable and therefore negligent. Plaintiff's statement regarding the move was set forth in Exhibit 12 where it is said:

> "This same move is made at Provo on almost all locals that go east, and I have handled work in this same way hundreds of times. We do the work differently, depending upon what the men decide when they go to cut the thru cars in behind the shorts. Sometimes they cut them before we pull up, so when the start is made we just continue out of town, and other times they handle it in the manner done on this date. *Either way is proper and usual.*"

In abstracting the plaintiff's evidence, we have taken that portion which is least favorable to plaintiff's contention of negligence in view of the rule adopted by this Court that unless such least favorable evidence is of such a character as will sustain a verdict on that issue, the plaintiff is not entitled to go to a jury. *Wheeler* v. *Fidelity and Deposit Company of Maryland*, (8th Cir.), 63 F. 2d 562; *Benson* v. *Denver and Rio Grande Western Railroad Company*, 4 Utah 2d 38, 286 P. 2d 790. Considering the plaintiff's evidence in light of defendant's case, there was no substantial evidence of negligence upon the part of the Railroad Company. The finding was inescapable that the switching move involved here was impossible of execution without resulting slack action.

All of the errors assigned by the appellant relate to instructions given by the court. We submit that plaintiff was not entitled to go to a jury and it follows that no instruction, erroneous or otherwise, could have any bearing on the proper outcome of the case. Assuming arguendo that there was a fact question on the issue of defendant's negligence, still there was no error which would justify a reversal of the judgment below. The following pages will discuss the instructions complained of by the plaintiff.

STATEMENT OF POINTS RELIED ON

POINT I.

INSTRUCTION NO. 25 WAS NOT PREJUDICIAL ERROR.

POINT II.

INSTRUCTION NO. 19 WAS NOT PREJUDICIAL ERROR.

POINT III.

INSTRUCTION NO. 20 WAS NOT PREJUDICIAL ERROR.

POINT IV.

INSTRUCTION NO. 23 WAS NOT PREJUDICIAL ERROR.

POINT V.

INSTRUCTION NO. 24 WAS NOT PREJUDICIAL ERROR.

POINT VI.

INSTRUCTION NO. 21 WAS NOT PREJUDICIAL ERROR.

POINT VII.

THE COURT DID NOT COMMIT PREJUDICIAL ERROR WHEN IT STRUCK THE TESTIMONY OF THE WITNESS, PAUL FRANK THOMAS.

ARGUMENT

POINT I.

INSTRUCTION NO. 25 WAS NOT PREJUDICIAL ERROR.

Instructon No. 25 told the jury what was required of the plaintiff "by the safety rules of The Denver and Rio

Grande Western Railroad Company," i. e., "to protect himself against injury *as far as possible* from jerks, slack action or any other unexpected motion by keeping a firm grip and a secure foothold when riding on or in moving equipment." The enactment of safety rules for the protection of employees is recognized by the courts as a salutory practice not to be discouraged by judicial disregard of the employee's violation. In fact, the general rule appears to be that in a suit against his employer, an employee's disobedience of a safety rule promulgated for the employee's protection amounts to negligence as a matter of law.

35 Am. Jur. 701. Cases collected at footnote 13.
Unadilla Valley R. Co. v. *Caldine*, 278 U. S. 139, 49 Sup. Ct. 91.

The existence of a safety rule and the employee's knowledge of it are always material in determining whether or not the employee was negligent. Plaintiff's complaint here is that the safety rule was made the standard of care and that it is a more stringent standard than the law otherwise imposes. We submit that neither position is correct.

The standard of care imposed by the rules of negligence was defined in Instructions Nos. 7, 11, 12 and 13. Plaintiff takes no exception to these instructions. The import of Instruction No. 25 is not to substitute the safety rule for the standard set forth in these 4 instructions but merely to advise the jury of the rule. This was perfectly proper for even if it be held that a knowing violation is not negligence per se, still it is a circumstance to be considered by the jury in deliberating on the issue of negligence. The instruction tells the jury what the safety rules require of

the plaintiff. It does not tell the jury that a violation is negligence.

Assume, however, that the instruction is to be interpreted as informing the jury that a violation of this particular safety rule would be negligence per se. Was it error under the facts of this case to so instruct the jury? We think not. Plaintiff's objection is that the rule requires the plaintiff to anticipate negligence. This is not so. The rule does require plaintiff to anticipate "as far as possible, jerks, slack action or any other unexpected motion * * * when riding on or in moving equipment". Here we are talking about "slack action" and not "any other unexpected motion." It is possible for plaintiff to anticipate slack action on freight trains in yard limits and under the evidence reasonable care requires that much as a matter of law. Plaintiff's own evidence demonstrates that trainmen must always be prepared for slack action in yard limits in order to protect themselves. It is not possible to anticipate negligence and since the rule requires only that the employee protect himself "as far as possible" it does not mean that he must anticipate negligence. *That portion of the rule material to the facts of this case requires only that the employee protect himself "as far as possible from * * * slack action."* This is not unreasonable. Certainly the reasonable man standard would require this of a trainman in plaintiff's position. This safety rule is like the one involved in the case of *Pauly* v. *McCarthy*, 109 Utah 398, 166 P. 2d 501, where the court said:

> "It was a cautionary rule for the safety of the employee. It simply put in rule form a precaution

which common sense would without the rule have prescribed as proper care on the part of a prudent man."

Plaintiff also contends that the instruction revives the defense of assumed risk. Apparently it is plaintiff's position that the instruction tells the jury in effect that the plaintiff cannot recover if he knew or was aware of danger presented by the defendant's negligence. The complete answer to this tenuous argument is that neither this instruction nor any other instruction given by the court instructs the jury that violation of the safety rule or even negligence of the plaintiff would be a defense. The jury was instructed that if the defendant was guilty of negligence which proximately caused plaintiff's injuries, plaintiff was entitled to recover (without regard to plaintiff's negligence). In the cases cited by plaintiff, there was an instruction on assumed risk and the same was accompanied with a statement that the plaintiff could not recover if he knew or was aware of the danger. This instruction at the most defined the standard of care and nothing more. It did not even relate to assumed risk and there was no language therein which indicated that plaintiff's own conduct could be a defense. We submit that Instruction No. 25 was not error.

But even should the court conclude that Instruction No. 25 was error, it could not possibly have been prejudicial error. We have already pointed out that there was no substantial evidence of negligence and hence the matter should not have been submitted to the jury. Aside from this, however, the jury's verdict of "no cause of action" necessarily

(under the instructions of the court) amounts to a finding that the defendant was not guilty of negligence which was a proximate cause of the accident. It must be remembered that contributory negligence is not a defense in F. E. L. A. cases. It is material only by way of diminution of damages (45 U. S. C. A. § 53. See Appellant's Brief and cases cited, Page 21). The court repeatedly instructed the jury that if they found the defendant negligent. * * *

> "And if you further find from a preponderance of the evidence that such negligence proximately caused, in whole or in part, injuries to plaintiff then you should return a verdict in favor of the plaintiff and against the defendant and award to plaintiff damages as in these instructions set forth." (Instructions Nos. 12, 13, 14 and 15.)

The jury under the instructions was to return a verdict regardless of plaintiff's negligence if they found defendant was negligent and its negligence was a proximate cause of the plaintiff's injuries.

"Plaintiff's negligence had a bearing only to the extent it might diminish the amount of the verdict (R. 344). A "no cause of action" verdict in this case necessarily meant that the jury found there was no negligence on the part of the railroad company proximately contributing to the injuries of plaintiff. Had the jury found the issues of negligence and proximate cause in favor of plaintiff, it would have been their duty under the instructions of the court to return a verdict in favor of plaintiff (See the forms of verdict and the court's explanation to the jury. R. 344). We find no instruction here which would allow the jury

to return a verdict of no cause of action on account of plaintiff's negligence even if it were the sole proximate cause of the accident. If there had been such an instruction given, it would not change the picture here for a finding that plaintiff's negligence was the sole cause would necessarily mean that the jury found there was no negligence on the part of the defendant which proximately caused the accident.

Since the jury's verdict amounts to a finding of no negligence on the part of defendant proximately causing the plaintiff's injuries, no instruction on contributory negligence could have been prejudicial.

POINT II.

INSTRUCTION NO. 19 WAS NOT PREJUDICIAL ERROR.

Plaintiff's counsel complain of instruction No. 19 because it precluded recovery unless the jury found that there was "an unexpected jarring or jerking of unusual and unnecessary severity." It is claimed that this was prejudicial error because it placed the burden upon plaintiff

> "of establishing not only that the stop was unusually and unnecessarily severe, but that no stop was reasonably to be expected by plaintiff. An expected stop could be of the severest nature imaginable, and could be caused by the gravest kind of neglect, but plaintiff still couldn't recover under this instruction." (Appellant's Brief, Page 21.)

The evidence in this case is undisputed that the jar which caused plaintiff's fall was "unexpected" by him. The record

is replete with his explanation that he thought the train was pulling out and he did not expect a stop. Contrary to plaintiff's interpretation, the instruction refers only to a stop "not expected" by plaintiff and says nothing about a stop "not reasonably to be expected." Under this instruction the plaintiff did not have the burden to show that the stop was in the latter category. Perhaps the court should have required this proof but plaintiff cannot complain of the court's failure to impose that burden.

There was no evidence here as to "an expected stop" and counsel's statement that "an expected stop could be of the severest nature imaginable * * * but plaintiff still couldn't recover" is just grasping at straws. This case involves a stop which all parties agree was "unexpected" by plaintiff. The word "unexpected" as it is used in this instruction is actually surplusage.

Plaintiff's final attack on this instruction is that it

> "eliminates plaintiff's right to recover if the stop, although normal, was not reasonably to be expected." (Appellant's Brief, Pages 21-22.)

The answer to this argument is that if this stop was not unusually or unnecessarily severe (or as plaintiff say, it was a "normal" stop) defendant could not be held guilty of negligence. If not "unusually or unnecessarily severe" it follows that any jar which accompanied the stop was usual and necessary. Plaintiff cannot recover simply because a stop was made when he didn't expect it. We find no decisions which hold a railroad company guilty of negligence by reason of the fact that a freight train was stopped during switching operations in a railroad yard.

Instruction 19 was not error.

POINT III.

INSTRUCTION NO. 20 WAS NOT PREJUDICIAL ERROR.

Plaintiff's counsel take exception to Instruction No. 20 because it * * *

> "eliminates plaintiff's contention that the making of the stop at all could have been found by the jury to be negligence on the part of the railroad company." (Appellant's Brief, Pages 22-23.)

Plaintiff made no contention below that the making of the stop itself amounted to negligence. There was no such allegation in the pleadings. There was no such contention made at pre-trial when the contentions of negligence were limited to those pleaded There was no requested instruction on this theory. Plaintiff's testimony itself limits the issue as follows:

> (R. 197)
>
> "Q. In any event, you don't blame any of the brakemen for anything that occurred in this particular case?
>
> "A. No, sir.
>
> "Q. You are putting the blame solely on an improper application of the brakes by the engineer.
>
> "A. Yes, sir."

See also R. 156, 157.

Switching operations are necessarily characterized by stops and starts and short movements. There was nothing unusual about this movement. Plaintiff's own evidence demonstrates this. It is possible that the switching of cars

into the train could have been handled in one of two alternative ways. With regard to this, plaintiff said: "Either way is proper and usual" (Exhibit 12). The experienced trainmen decided on the move which was made and the engineer simply acted on the brakemen's signals. Certainly the move itself was not negligence. Defendant was not deprived of any of his contentions below.

Plaintiff also urges that Instruction No. 20 does violence to the doctrine of res ipsa loquitur because of the statement therein that

> "slack action, even though * * * severe * * * does not in and of itself establish negligence on the part of the Railroad."

This, of course, was a correct statement of the law. It did not deprive plaintiff of the benefit of the doctrine of res ipsa loquitur. Counsel's statement that "unexplained severe slack action would support a finding of negligence" (Appellant's Brief, Page 25) is not the law. If res ipsa was applicable in this case, it was only on a finding (1) that the train was in the possession of and under the exclusive control of the defendant and that it appears that the injury resulted from some act or omission incident to the defendant's responsibility to use due care with respect to such train; (2) that the incident was of such nature as does not happen in the ordinary course of things if those who have control of the train use ordinary care, and (3) that the circumstances surrounding the causing of the occurrence were such that the plaintiff is not in a position to know what specific conduct was the cause, where the defendant may reasonably be expected to know, and be able to explain

the cause of the incident. J. I. F. U. 17.30; *White* v. *Pinney*, 99 Utah 484, 108 P. 2d 249; *Loos* v. *Mountain Fuel Supply Co.*, 99 Utah 496, 108 P. 2d 254; *Wightman* v. *Mountain Fuel Supply Co.*, 5 Utah 2d 373, 302 P. 2d 471. Thus, slack action alone (explained or unexplained) was not enough to support an inference or finding of negligence, and Instruction No. 20 was correct. Plaintiff got the full benefit of the doctrine of res ipsa from Instruction No. 14.

But, plaintiff was not entitled to go to the jury on res ipsa anyway. His own evidence failed to satisfy the requirements of the doctrine. Slack action was shown to be a necessary and common incident of switching movements. Severe slack action commonly occurs in the absence of negligence and plaintiff and every one of his witnesses (except the doctor) knew and testified as to the cause of slack action. This was not such an incident as "does not happen in the ordinary course of things" nor was plaintiff in a position where he could not be expected to "know what specific conduct was the cause." Plaintiff himself said that it was common and usual for slack action to accompany switching movements and that it was common for freight trains to stop and start within yard limits. According to his own testimony, the slack action here, though severe, was "not unusual" (R. 171). The cases hold that res ipsa is not applicable under the circumstances of this case. See e. g. *Hunt* v. *Chicago, B. & Q. R. Co.*, 181 Iowa 845, 165 N. W. 105. In the *Hunt* case the court said:

> "* * * 'Turning, then, to the case before us, what was the accident which resulted in the plaintiff's injury? It was a sudden jerking to an unusual degree of the caboose of a freight train.

What were the circumstances of this unusual jerking? In a sense, there were no circumstances, except the fact of the jerking, unless we treat as a circumstance the fact that the train was about to stop at the water tank. Such a stop would need to be at a particular place, and the attempt to make it might result in a sudden jerking. The so-called accident was so void of circumstances that it would not have been deemed as an accident at all, except for the injury to the plaintiff. We think it quite clear that there is nothing in the nature of the circumstances of this accident to open the door to the application of the doctrine of res ipsa. To apply such doctrine to this case would be in effect to say that the fact of the accident is prima facie proof of the negligence.' "

Instruction No. 20 was not error.

POINT IV.

INSTRUCTION NO. 23 WAS NOT PREJUDICIAL ERROR.

Plaintiff's exception to Instruction No. 23 is upon the same grounds as his exception to Instruction No. 20. The plaintiff himself testified:

"Q. You are putting the blame solely on an improper application of the brakes by the engineer.
"A. Yes, sir."

The court instructed by Instruction No. 20:

"Before you can find the Railroad negligent in this case you must find that the engineer operating the train failed to do what an ordinary prudent engineer would have done under the circumstances."

We fail to see the error. Counsel argues that this instruction precluded a possible finding that the brakemen, Wonnacott and Serassio, were negligent. With regard to this, plaintiff said:

> "Q. In any event you don't blame any of the brakemen for anything that occurred in this particular case?
>
> "A. No, sir."

There was no contention below that the stop itself as distinguished from the manner of the stop was negligence. Neither the pleadings, pretrial order nor requested instructions set forth such a theory. Instruction 23 was in complete accord with plaintiff's evidence and the theory on which the case was tried below. Even had plaintiff contended below that the stop itself was negligence, such theory should not have been submitted to the jury for reasons stated in answer to Point III, *supra*, and particularly in view of the fact that plaintiff himself said the move which necessitated the stop was "proper and usual" (Exhibit 12). A contrary holding would virtually make it impossible for railroad companies to conduct switching operations without liability to any employee who may be injured by movement of a train. This court is aware of the fact that the operation of a freight train is not a sight-seeing tour. It is necessarily attended with unavoidable perils well known to experienced trainmen.

POINT V.

INSTRUCTION NO. 24 WAS NOT PREJUDICIAL ERROR.

Instruction No. 24 is substantially identical to J. I. F. U. Instruction No. 16.6. It is an established rule of law in

negligence cases that the mere fact of an accident does not support an inference of negligence. *Williams* v. *Ogden Union Railway and Depot Company*, 119 Utah 529, 230 P. 2d 315; *Horsley* v. *Robinson*, 112 Utah 227, 186 P. 2d 592. This is so even in a case where res ipsa is applicable. It is pointed out under Point III, *supra*, that the doctrine of res ipsa is not applicable except upon specific findings in addition to the occurrence of the accident itself. Instruction No. 14 gave the plaintiff full benefit of the doctrine of res ipsa loquitur. We point out here, as we have previously noted, that the plaintiff in this case was not entitled to the benefit of that doctrine anyway.

POINT VI.

INSTRUCTION NO. 21 WAS NOT PREJUDICIAL ERROR.

Instruction No. 21 told the jury that an independent application as distinguished from a service application would not ipso facto establish negligence. The jury was told by said intruction that they should determine whether an independent application would under the circumstances amount to negligence. Certainly it was the jury's prerogative under the evidence to determine this. The evidence disclosed that either type of brake application would result in slack action.

It is difficult to see how the plaintiff can complain of this instruction. Plaintiff now argues that an independent application of the brakes would have amounted to negligence as a matter of law. Plaintiff did not request an instruction to that effect. The jury had already been in-

structed that it was their duty to decide the issue of negligence. In the absence of said instruction, they would have been required under the general instructions of the court to determine what type of application had been made and whether or not the specific application amounted to negligence. Instruction No. 21 did not therefore change the picture at all. Even if the instruction had been error, it could neither have helped the defendant nor hindered the plaintiff. In the absence of a special request by plaintiff, he is hardly in a position to argue that the trial court should have instructed that specific conduct amounted to negligence or that the court erred in instructing that specific conduct did not amount to negligence as a matter of law.

An additional answer to plaintiff's argument on this point is that considering the testimony of the engineer and the expert witness there was no substantial evidence that an independent application had been made. Certainly the plaintiff and Serassio, standing a mile behind the locomotive, were in no position to judge. Likewise Wonnacott could not have possibly known whether a service application or an independent application had been made.

We submit that Instruction No. 21 could not have adversely affected plaintiff's case.

POINT VII.

THE COURT DID NOT COMMIT PREJUDICIAL ERROR WHEN IT STRUCK THE TESTIMONY OF THE WITNESS, PAUL FRANK THOMAS.

The witness, Thomas, testified that on the evening of the accident he was in the defendant's yard office. He said

that he heard a train stop and "one crash" (R. 266). He did not know whether he had seen the train or not (R. 265), and, of course, he was unable to identify it or any of the cars or the caboose. His characterization of the stop as being a single crash was contrary to all of the other evidence indicating that the stop resulted in a rumble and a series of crashes or "bings" as the cars and the train came to a stop. To say that what Thomas heard was the same train involves a good measure of speculation and conjecture. But what difference does it make what he heard? The evidence was clear that there was slack action resulting in noise as the train came to a stop. There is no dispute on this. What Thomas heard adds nothing whatever to the plaintiff's case and the exclusion of such testimony could not even by the greatest stretch of the imagination have been prejudicial.

Regarding Thomas's testimony pertaining to the appearance of the plaintiff sometime after the accident, we point out that such evidence might have probative value if there was an issue as to the fact that plaintiff was injured. This, however, was undisputed, the fact of injury being testified to by plaintiff and corroborated by other evidence in the record. The exclusion of evidence relating to this could not have been prejudicial in this case. The jury never got to the issues of damage as the case was obviously decided on the issue of negligence. There was proof of injury and damages, and if we assume, as we must, that the jury followed the instructions of the court, their verdict would necessarily have been in favor of the plaintiff and some damages would have been awarded had they found in favor

of plaintiff on the issue of negligence and proximate cause. It therefore follows that the testimony of Thomas could not possibly have made any difference in the outcome of this case.

CONCLUSION

We submit that the plaintiff has been accorded a fair and impartial trial of his case. The jury under proper instructions from the court simply found that the defendant was not guilty of any negligence proximately causing plaintiff's injuries. We also submit that this issue of negligence should have been decided by the court on defendant's motion for directed verdict. Plaintiff is not entitled to a new trial.

Respectfully submitted,

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