

1959

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

Utah Supreme Court

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Case No. 9028

IN THE SUPREME COURT
of the
STATE OF UTAH

FILED

OCT 21 1959

PARLEY D. BILLS,

Plaintiff and Appellant

vs.

THE DENVER & RIO GRANDE
WESTERN RAILROAD COM-
PANY, a corporation,

Defendant and Respondent.

Clerk, Supreme Court, Utah

BRIEF OF APPELLANT

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TABLE OF CONTENTS

	<i>Page</i>
STATEMENT OF THE CASE.....	1
A. PRELIMINARY STATEMENT	1
B. THE FACTS	3
STATEMENT OF POINTS	9
ARGUMENT	9
POINT I. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY GIVING INSTRUCTION NO. 25....	9
POINT II. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY GIVING INSTRUCTION NO. 19.	18
POINT III. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY GIVING INSTRUCTION NO. 20.	22
POINT IV. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY GIVING INSTRUCTION NO. 23.	25
POINT V. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY GIVING INSTRUCTION NO. 24.	26
POINT VI. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY GIVING INSTRUCTION NO. 21.	28
POINT VII. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR WHEN IT STRUCK THE ENTIRE TESTIMONY OF THE WITNESS PAUL FRANK THOMAS.	30
CONCLUSION	35

AUTHORITIES CITED

CASES

Ayres v. The Union Pacific Railroad Company (decided Jan. 6, 1947) 111 Utah 104, 176 P. 2d 161.....	19, 20
Beck v. Sirota (Cal.) 109 P. 2d 419	12
Boston & M. R. R. v. Meech, 156 F. 2d 109, 111 (1 C.C.A. Cir. den. Oct. 28, 1946, 67 S. Ct. 124).....	23, 26
Bowers et ux v. Foster et ux., (Wash.) 278 P. 1072.....	12
Bruner v. McCarthy, et al., 105 Utah 399, 406, 142 P. 2d 649....	11
Coray v. Ogden Union Railway & Depot Company, 180 P. 2d 542	31
Grauer v. Alabama Great Southern R. Co., 209 Ala. 568, 96 So. 915	28

TABLE OF CONTENTS

(Continued)

	<i>Page</i>
Greenwood v. Summers, et al., (Cal.) 149 P. 2d 35.....	12
Hackley v. Southern Pacific Co., (Cal.) 45 P. 2d 447.....	28
Hankins v. Reimers, 86 Nebr. 307, 125 N.W. 516.....	28
Hechler et al v. McDonnell (Cal.) 109 P. 2d 426.....	12
Johnson v. Erie Railroad Company (2 Cir. decided Oct. 6, 1956) 236 F.2d 352.....	16
Kansas City Southern Railway Company v. Justis (Fifth Circuit, Apr. 6, 1956), 232 F. 2d 267, 60 A.L.R. 2d 628.....	23
Lavender v. Kurn, 327 U.S. 645, 66 S. Ct. 740.....	32
Mathews v. Daly West Mining Co., 27 Utah 193. 75 P. 722 (1904)	11
McCulloch v. Horton (Mont.) 56 P. 2d 1344.....	12
Missouri Pac. R. Co. v. Keeton, 207 Ark. 793, 183 S.W. 2d 505, 326 U.S. 689, 66 S. Ct. 135.....	20
Murphy v. Boston & Main R.R., 65 N.E. 2d 923.....	26
Orris v. Chicago, R. I. & P. Ry. Co., (Mo.) 214 S.W. 125.....	28
Padilla v. Atchison, T. & S. F. Ry. Co., (1956) 295 P. 2d 1023, 61 N.M. 115	21
Patrick Wetter v. The Atchison, Topeka and Santa Fe Ry. Co., 227 Ill. App. 275.....	28
Paulsen v. McAvoy Brewing Co., 226 Ill. App. 605.....	28
Perrin v. Union Pacific R. Co., 59 Utah 1, 201 P. 405.....	28
Pinello v. Taylor (Cal.) 17 P.2d 1039.....	12
Southern Ry. Co. v. Smith (Ala.) 221 Ala. 273, 128 S. 228.....	28
Texas and Pacific Railway Company v. Buckles, (Sixth Cir. dec. Apr. 6, 1956), 232 F. 2d 257, cer. den. 76 S. Ct. 1052..	15
Thomas, Appellant, v. Union Railway Company, Appellee, (Sixth Cir. Oct. 14, 1954) 216 F. 2d 18.....	14, 21
Tiller v. Atlantic Coast Line R. Co., 318 U.S. 54, 87 L. Ed. 610, 63 S. Ct. 444.....	14
Wilkerson v. McCarthy et al., 336 U.S. 53, 69 S. Ct. 413.....	26

TEXTS

38 American Jurisprudence	27, 28
---------------------------------	--------

STATUTES

45 U.S.C.A. Section 51.....	2, 3
45 U.S.C.A. Section 53.....	3
45 U.S.C.A., Section 54.....	3, 13

IN THE SUPREME COURT
of the
STATE OF UTAH

PARLEY D. BILLS,
Plaintiff and Appellant

vs.

THE DENVER & RIO GRANDE
WESTERN RAILROAD COM-
PANY, a corporation,
Defendant and Respondent.

} Case No. 9028

BRIEF OF APPELLANT

STATEMENT OF THE CASE

A. PRELIMINARY STATEMENT

The parties are referred to as in the court below.

All italics are ours.

Parley D. Bills, was injured while engaged in the performance of his duties as conductor on the 20th day of April, 1955, when he was thrown to the floor of the caboose on defendant's freight train Extra #5501 East, as said train was moving along defendant's east bound

mainline track at Provo, Utah' (R. 2, 4, 122, 139).

Plaintiff filed his complaint in the Third Judicial District Court in and for Salt Lake County, State of Utah, on the 21st day of March 1958, alleging that he was an employee of The Denver & Rio Grande Western Railroad Company, a corporation; that he suffered certain injuries while in the course of his employment, that his action was governed by the Federal Employers' Liability Act, 45 U.S.C.A. Section 51, et seq. and that his injuries were caused in whole or in part by defendant's negligence in subjecting the caboose to an unusually violent jerk, and to a jerk that was not reasonably to be expected by plaintiff. Plaintiff further alleged negligence on the part of defendant by virtue of the doctrine of *Res Ipsa Loquitur* (R. 1, 2, and 3).

Defendant, by its answer, admitted its corporate existence, admitted that plaintiff's action was filed pursuant to the Federal Employers' Liability Act, and denied the other allegations of plaintiff's complaint (R. 4).

The case was tried before the Honorable Martin M. Larson commencing on the 1st day of December, 1958. The jury returned a six to two verdict of no cause of action (R. 58). Thereafter plaintiff filed a motion for new trial which was denied and the notice of appeal was filed on the 5th day of March, 1959 (R. 60).

Upon admitted facts the remedy afforded plaintiff is controlled by the Federal Employers' Liability Act.

Particular attention is called to 45 U.S.C.A. Section 51 which establishes liability for injuries resulting "in whole or in part" from negligence of the carrier, 45 U.S.C.A. Section 53 which provides that contributory negligence of an employee shall not bar recovery but shall only diminish the damages, and 45 U.S.C.A. Section 54 which abolishes assumption of risk as a defense.

B. THE FACTS

Plaintiff was 48 years of age at the time of his injuries. He had worked continuously for defendant as a brakeman and conductor since September of 1927 (R. 117). On the 20th day of April, 1955, he was assigned as conductor of an extra freight train scheduled to leave Salt Lake City at 3:15 P.M. with its ultimate destination Helper, Utah. The train consisted of a 4-unit diesel, 112 empties, 8 loads, and a caboose (R. 120). The first stop was made at Riverton, the next at American Fork, and the train arrived at Provo on the eastbound mainline track at approximately 7:00 P.M. (R. 121, 122). Plaintiff was riding the caboose. The stop was "a very normal, gentle stop" (R. 124). Thereafter plaintiff went to the yard office, delivered his switch list and waybills, and obtained a list of the cars to be picked up at Provo (R. 125). He then advised head brakeman Wonnacott and rear brakeman Serassio of the switching which was to take place and returned to the caboose for the purpose of "writing my train up" (R. 126).

The tracks involved were as follows: The eastbound mainline track which extends in a general northerly-

southerly direction; immediately to the east of the eastbound mainline track and adjacent thereto, the westbound mainline track; immediately to the east of the westbound mainline track and adjacent thereto, the pocket track; immediately to the east of the pocket track and numbered 1, 2, 3, 4, 5, 6, 7, etc., and adjacent thereto, a series of storage tracks; connecting the south ends of the pocket track and tracks 1, 2, 3, 4, 5, 6, 7, etc. and extending in a northeasterly-southwesterly direction, a lead track which is referred to also as a crossover where it proceeds across the westbound mainline track and connects to the eastbound mainline track (R. 124, 125).

The switching operation to be performed by plaintiff's crew was as follows: 30 cars were to be taken off the head end of the train and set out on one of the storage tracks heretofore mentioned. Other cars were to be picked up on track No. 1 and placed at the head end of the train (R. 122, 125, 201). Wonnacott and Serassio were to handle these final switching operations (R. 220).

The stop involved in the accident was unnecessary. The rear of the train, including the caboose, could have been left on the east bound mainline track where the original stop had been made. The engine and head end of the train could have been cut off, moved ahead approximately 20 carlengths and backed across the crossover. The necessary switching operations could then have been performed, the engine and cars moved forward across

the crossover and backed to a coupling with the rest of the train (R. 215, 216). If this procedure had been followed the train could then have moved out of town without another stop.

Krocscher, the engineer of plaintiff's crew, admitted the last stop was unnecessary and that the switching could have been accomplished without pulling the rear of the train down and stopping (R. 303, 304, 305). He also admitted that he had been advised beforehand that the last stop was to be made (R. 305).

The brakemen, unbeknownst to plaintiff, nevertheless had the engineer pull the entire train which was over a mile in length, a distance of approximately 20 carlengths and then brought the movement to a stop, with the plaintiff located in the caboose doing his paper work (R. 215, 216, 236). At this time it was getting dark and the brakemen were using their lanterns for signalling (R. 235).

Although the evidence was in conflict on the point, defendant introduced expert testimony to the effect that such a movement and stop could not be made without severe slack action occurring at the rear of the train (R. 305, 322).

After the train had moved possibly 15 carlengths, plaintiff arose from his desk and started to walk toward the rear end of the caboose. His purpose was to determine whether the rear brakeman had mounted the caboose and whether the switches were lined properly as they were

leaving town. This was customary. The train was proceeding approximately 5 or 6 miles an hour (R. 127). Plaintiff described the stop as follows (R. 128):

“A. Well, when I got about fifteen feet from my desk the caboose just stopped suddenly. There was no motion at all. We just stopped dead still and I was thrown backward onto the floor and skidded along the floor until I hit the end of the caboose.

“Q. How far did you move from the place where you were located at the moment of this stop?

“A. Approximately fifteen feet.”

The stop was so violent that it threw all the papers and manifest sheets to the floor of the caboose (R. 129).

Plaintiff further testified that the amount of slack action was not in accordance with customary and safe railroading operation (R. 188, 189).

On direct examination Wonnacott described the slack action as a “terrific run-in” (R. 223) and on cross examination he testified as follows (R. 224):

“Q. And slack action, severe slack action in moves of this kind is not at all unusual, is it?

“A. Well, I wouldn’t say that. This was a pretty severe one.” (R. 226).

Again he testified: “Well, I don’t think it should have come to that fast a stop.” (R. 230).

Serassio testified that he was standing near where the clearance point would be and was signaling directly

to the engineer (R. 244). When the train reached the point where the stop was to be made he gave an easy sign and then a stop sign. The cars stopped near where he wanted them (R. 237, 244). He did not remember how close they were to the clearance point (R. 245).

He testified concerning the nature of the stop as follows: "Well, it was severe. Severe." (R. 238). And again: "Q. As compared to the customary stop of a train of this type, on this track with this movement, was it severe or easy? * * * A. I would say it was severe, yes."

He further testified that at the time he gave the stop signal there remained plenty of room on the track for the train to have made an easy stop (R. 239).

There was abundant evidence from which the jury could have found that there was no need for the stop to have been so violent.

The two air braking systems which could have been used in stopping the train were the automatic, or train brakes, and the independent, or engine brakes. The automatic brakes apply brake pressure to the wheels on the entire train, including the engine and the caboose. The independent brakes apply brake pressure only to the wheels of the engine, and if there is slack in the train this slack will run in when said brakes are used alone (R. 168). Plaintiff gave his opinion that the engineer had used the independent rather than the automatic brakes and that this accounted for the violence of the

slack action (R. 137, 138, 139, 176, 177, 178).

Wonnacott testified that in his opinion the independent rather than the train brakes had been used. He based his opinion on experience and the fact that the head end of the train seemed to stop all of a sudden before the cars did (R. 206, 230).

Wonnacott also testified that "he can apply the air where it gradually stops those cars" (R. 226).

Serassio was of the same opinion, testifying again and again that if the customary procedure of using the automatic rather than the independent air had been followed the stop would not have been so severe (R. 250, 251, 254, 257, 259, 282, 283). Serassio further testified that he actually saw from the lack of piston travel that the independent rather than the automatic brakes had been used (R. 259).

Plaintiff was not prepared for the slack action for two reasons. First, he thought the train was leaving town. Second, he did not expect slack action of the degree of violence that occurred. Normal slack action, in his opinion, would not have caused him to be injured (R. 127, 128, 171).

Following the accident plaintiff left the train, went to the yard office and reported his injury. He then returned to the train and proceeded to Thistle, a distance of approximately 20 miles, at which point he was relieved (R. 140, 141). He suffered a ruptured intervertebral disc which later required a fusion operation with result-

ant permanent partial disability (R. 85, 86, 87, 88).

STATEMENT OF POINTS

POINT I.

THE TRIAL COURT COMMITTED PREJUDICIAL
ERROR BY GIVING INSTRUCTION NO. 25.

POINT II.

THE TRIAL COURT COMMITTED PREJUDICIAL
ERROR BY GIVING INSTRUCTION NO. 19.

POINT III.

THE TRIAL COURT COMMITTED PREJUDICIAL
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POINT VI.

THE TRIAL COURT COMMITTED PREJUDICIAL
ERROR BY GIVING INSTRUCTION NO. 21.

POINT VII.

THE TRIAL COURT COMMITTED PREJUDICIAL
ERROR WHEN IT STRUCK THE ENTIRE TESTIMONY
OF THE WITNESS PAUL FRANK THOMAS.

ARGUMENT

POINT I.

THE TRIAL COURT COMMITTED PREJUDICIAL
ERROR BY GIVING INSTRUCTION NO. 25.

For convenience of the Court, Instruction No. 25 is herein set forth:

"Plaintiff in the exercise of reasonable care is required by the safety rules of The Denver and Rio Grande Western Railroad Company 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."

Instruction No. 25 is defendant's requested Instruction No. 9. Counsel for plaintiff made the following exception to said instruction:

"Plaintiff objects to the giving of Instruction No. 25 on the grounds that it states that plaintiff, in the exercise of reasonable care, is required by the safety rules of the Denver & Rio Grande Railroad Company to protect himself 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 moving equipment, on the grounds and for the reason that the plaintiff would not be required, under the law, to protect himself against unexpected motions of the type indicated, and the rules of the company cannot be made contrary to the rules of law and become a standard of care to be imposed upon its own employees, for the reason that it can be easily seen that such rules could be made which would make them negligent regardless of what they did; and to say that they are negligent for not anticipating unexpected motions goes too far, and is an incorrect statement of the law." (R. 351, 352).

In conjunction with Instruction No. 25 which re-

quires plaintiff to expect the unexpected we call attention to Instruction No. 17 (a) which allows the jury to find not only that plaintiff was contributorily negligent but that his contributory negligence was the sole proximate cause of his own injuries.

The law is clear that it is not negligence for one to fail to anticipate and guard against harm which can come solely through the negligent acts of another person or persons.

See *Bruner v. McCarthy, et al.*, 105 Utah 399, 406, 142 P. 2d 649, where the court stated:

“* * * Where the accident has been caused by the failure to give such signal the party working in a crew responsible for such omission will not be heard to say that the injury suffered could have been avoided had the injured party conducted himself on the assumption that the signal would not be given; that the consequences of the delict could have been avoided had the injured party, as appears from hindsight, so conducted or positioned himself as to make the delict inconsequential.”

And in *Mathews v. Daly West Mining Co.*, 27 Utah 193, 75 P. 722 (1904), the court stated:

“It is also well settled that the negligence of the master is not among the risks so assumed by the servant. Therefore when the servant, in the discharge of his duties, is in a position which is, under the conditions which then exist, naturally safe, but is suddenly made dangerous by the negligence of the master, and the injury to the servant is immediately caused thereby, the master is liable.”

In *McCulloch v. Horton*, (Mont.), 56 P. 2d 1344, the court stated:

"The failure to anticipate negligence which results in injury is not negligence and will not defeat the action for the injury sustained. 20 R.C.L. 118; *Central Railroad Co. v. De Busley* (C.C.A.) 261 F. 561; *Wagner v. Philadelphia Rapid Transit Co.*, 252 Pa. 354, 97 A. 471; *North Bend Lumber Co. v. Seattle*, 116 Wash. 500, 199 P. 988, 19 A.L.R. 415."

In *Greenwood v. Summers, et al.*, (Cal.) 149 P. 2d 35, the court recognized the rule in the following language:

"The general rule is that every person who is himself exercising ordinary care has a right to presume that every other person will perform his duty and obey the law, and in the absence of reasonable ground to think otherwise it is not negligence to assume that he is not exposed to danger which comes to him only from violation of law or duty by such other person. See *Harris v. Johnson*, 1916, 174 Cal. 55, 58, 161 P. 1155, L.R.A. 1917C, 477, Ann. Cas. 1918E, 560; *Pinello v. Taylor*, 1933, 128 Cal. App. 508, 512, 17 P. 2d 1039."

See also *Pinello v. Taylor* (Cal.) 17 P. 2d 1039, *Bowers, et ux. v. Foster et ux.*, (Wash.) 278 P. 1072; *Beck v. Sirota* (Cal.) 109 P. 2d 419; and *Hechler et al v. McDonnell*, (Cal.) 109 P. 2d 426.

The primary vice of Instruction No. 25 is that plaintiff is required to anticipate and guard against all unexpected jerks, regardless of their origin or severity.

Even though smooth operation would normally be expected, and a jerk occurs, plaintiff must expect the jerk because an operating rule of the Denver & Rio Grande Railroad Co. so decrees. He must expect a stop from a sudden failure of equipment, a bolt of lightning, or the negligent act of a fellow employee because the railroad has a rule to that effect. *And if he doesn't expect the unexpected he is negligent as a matter of law.* Even though a reasonably prudent person under the circumstances would not expect a jerk, this plaintiff must expect a jerk because his employer has enacted a rule. This is the first case to our knowledge in which a trial court has ever permitted a railroad company to repeal an act of Congress. And we call the Court's attention to the fact that defense counsel led the trial court into this ridiculous error with his Requested Instruction No. 9.

Instruction No. 25 also revives the outlawed defense of assumption of risk.

In the year 1939 Congress amended the Federal Employers' Liability Act and abolished the doctrine of assumption of risk as a defense. 45 U.S.C.A. Section 54 reads as follows:

"§54. Assumption of risks of employment. In any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agent, or em-

ployees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee. Apr. 22, 1908, c. 149 § 4, 35 Stat. 66; Aug. 11, 1939, c. 685 § 1, 53 Stat. 1404."

The leading case decided by the United States Supreme Court interpreting the above statute is *Tiller v. Atlantic Coast Line R. Co.*, 318 U. S. 54, 87 L. Ed. 610, 63 S. Ct. 444, wherein the background of the doctrine of assumption of risk is discussed and the court concludes in the following historic language:

"The doctrine of assumption of risk cannot be 'abolished in toto' and still remain in partial existence as the court below suggests. The theory that a servant is completely barred from recovery for injury resulting from his master's negligence, which legislatures have sought to eliminate in all its various forms of contributory negligence, the fellow servant rule, and assumption of risk, must not, contrary to the will of Congress, be allowed recrudescence under any other label in the common law lexicon * * * *"

A number of cases have followed the lead of the *Tiller* case, *supra*, in holding the line against efforts on the part of various lesser courts to limit and circumscribe the intent of Congress when it abolished the defense of assumption of risk. We cite *Thomas, Appellant, v. Union Railway Company, Appellee*, (Sixth Cir. Oct. 14, 1954) 216 F. 2d 18, where the trial court attempted to eliminate recovery by plaintiff if he knew and was

aware of danger created by negligence of the defendant and even in that situation the appellate court reversed and held that such knowledge on plaintiff's part was not a defense under the Federal Employers' Liability Act. The court stated:

"The trial court charged the jury that the railroad was not liable for injuries sustained from dangers that were obvious or as well known to the injured party as to the railroad; and that if the jury found from the evidence a dangerous condition of the concrete floor near the foreman's office, in the roundhouse, or deficient lighting facilities in that place, 'if such dangerous condition existed, was obvious, or as well known to the plaintiff Thomas as to the railroad, the defendant would not be liable for injury sustained from such dangerous condition.' The foregoing charged the employee with assumption of risk. This was error, as 'every vestige of the doctrine of assumption of risk was obliterated from the law (the Federal Employers' Liability Act) by the 1939 amendment.' *Tiller v. Atlantic Coast Line R. Co.*, 318 U.S. 54, 58, 63 S. Ct. 444, 446, 87 L. Ed. 610. Even though the employee may know that the employer has been negligent in the furnishing of a safe place to work, the employee does not, under the Federal Employers' Liability Act, assume the risks of such danger. *Williams v. Atlantic Coast Line R. Co.*, 5 Cir. 190 F. 2d 744, 748."

In *Texas and Pacific Railway Company v. Buckles*, (Sixth Cir. decided Apr. 6, 1956), 232 F. 2d 257, certiorary denied, 76 S. Ct. 1052, defendant requested an instruction in the following language:

"Where an employee of a common carrier by railroad operating in interstate commerce anticipates the risk resulting from the possible negligence of a fellow employee, or should under the circumstances anticipate such risk, and decides to chance that particular risk, he cannot recover for an injury resulting from such negligence. Therefore, if you find that complainant anticipated, or should have anticipated, the impact resulting from the coupling attempt and knew, or should have known, of the risk inherent in such an attempt and chanced that risk, your verdict must be for the defendant."

The appellate court sustained the trial court in refusing said instruction in the following language:

"Specification 5 is that the trial court erred in refusing to give special charge 8 requested by defendant. In the case relied on by appellant, *Owens v. Union Pacific Railway Co.*, footnote 6, supra, the Supreme Court spoke of what remained of the defense of assumption risk prior to the 1939 amendment to the Federal Employers' Liability Act abolishing that defense, now 45 U.S.C.A. §54. The accident in that case occurred before the enactment of that amendment, but suit was brought afterwards. By that amendment 'every vestige of the doctrine of assumption of risk was obliterated from the law.' *Tiller v. Atlantic Coast Line R. Co.*, 318 U.S. 54, 58, 63 S. Ct. 444, 446, 87 L. Ed. 610. Charge 8 was, therefore, properly refused."

In *Johnson v. Erie Railroad Company*, (2 Cir. decided Oct. 6, 1956) 236 F. 2d 352, the court, faced with a problem similar to that in the case at bar, stated:

"In addition, we think the court stated the issue of contributory negligence to the jury in such terms that it might be thought that assumption of the risk was a good defense, contrary to 45 U.S.C.A. §54. *Tiller v. Atlantic Coast Line R. Co.*, 318 U.S. 54, 63 S. Ct. 444, 87 L. Ed. 610. The relevant portion of the charge was as follows:

"'Now, as to the question of contributory negligence, which has been talked about in this case: Owen Johnson had been working part time, it is true, but he had been doing this job before. Is there anything that he did at the time that contributed to it? He knew what his condition was. He testified that the slightest bang on this bone might be an aggravation of this condition. He claims he wasn't warned and that that violated their rule by not warning him. But Del Guidice, his own witness, testified that it was a normal coupling that happened every night, and presumably every night they didn't stop to warn him because it was so gentle that nobody was pushed around. At least, you will be entitled to infer that from the testimony of Del Guidice.'

"From this it might have been thought that it was permissible to infer that, because on other occasions when the plaintiff was at work the locomotive crew did not warn the mail car occupants, the plaintiff had assumed the risks of an unexpected coupling of normal force. The specific exception to this passage was well taken."

The magnitude of the error committed by the trial court in giving Instruction No. 25 becomes apparent upon a moment of reflection. If, by enacting an operating rule, the railroad company could immunize itself against

acts which otherwise would be negligence, it could effectively eliminate all rights of recovery by railroad employees which have been so jealously guarded by our United States Supreme Court and other appellate courts in recent years. For example, a railroad could enact a rule that employees should guard against and expect unsafe hand brakes, and thus prevent recovery for violation of the hand brake provisions of the Safety Appliance Act. A similar rule could be enacted to immunize the railroad against any conceivable negligence or violation of the Safety Appliance Acts by a railroad company.

We do not believe that the Supreme Court of this State will ever seriously entertain establishing a precedent that would in effect delegate to railroad companies the power to modify, or circumvent the established law of the land simply by enactment of an operating rule.

POINT II.

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY GIVING INSTRUCTION NO. 19.

For convenience of the Court Instruction No. 19 is herein set forth:

Instruction No. 19

"You are instructed that couplers between railroad cars of necessity have some play or free action between them which results in some jerking or jarring of the cars whenever they are stopped or started or the speed of their movement changed, and this slack action may occur even though the train is operated in a careful and prudent manner. The plaintiff cannot, therefore, recover any damages in this action unless he proves by a

preponderance of the evidence that the train of cars on which he was riding when he claims to have fallen in the caboose was operated in such a manner as to cause an unexpected jarring or jerking of unusual and unnecessary severity and that he was caused to fall in the caboose by such unexpected, unusual jarring or jerking of the caboose."

It will be noted that Instruction No. 19 is defendant's requested Instruction No. 1. Counsel for plaintiff excepted to said instruction in the following language:

"* * * by this instruction the court requires the jury to find that the jarring or jerking was both unexpected and unusually and unnecessarily violent; and under the law, either an unexpected jarring or an unusual and unnecessary severity would be sufficient for recovery by plaintiff."

Counsel also cited the case of *Ayres v. The Union Pacific Railroad Company* (decided Jan. 6, 1947) 111 Utah 104, 176 P. 2d 161 (R. 347).

The error contained in Instruction No. 19 can best be seen by reference to certain facts established by the evidence in the case. Attention is called to the testimony of plaintiff, Wonnacott and Serassio that the slack action and resulting jerk of the caboose was unusually and unnecessarily severe (R. 128, 129, 223, 226, 230, 237, 238, 244, 245), and that said severity was accounted for by the engineer using the independent rather than the automatic brakes. And engineer Kroescher testified that use of the independent brakes for this kind of stop was neither customary nor proper.

The *Ayres* case, *supra*, and the case of *Missouri Pac. R. Co. v. Keeton*, 207 Ark. 793, 183 S. W. 2d 505, 326 U.S. 689, 66 S. Ct. 135, stand for the proposition that either of two different kinds of jerks or stops will warrant a finding of negligence on the part of a railroad company, the first being a stop which is not reasonably to be expected in the light of the circumstances surrounding the movement, and the second being a stop which, even if expected, is unusually and unnecessarily violent. This court, in the *Ayres* case, stated:

"The case of *Missouri Pac. R. Co. v. Keeton*, 207 Ark. 793, 183 S.W. 2d 505; *Keeton v. Thompson*, 326 U.S. 689, 66 S. Ct. 135, is one of the latest cases on the subject. In that case there was a conflict between the parties as to whether or not there was a sudden jerk at or about the time of the coupling. The testimony that there was, rested almost entirely upon statements of the deceased that there was a sudden hard stop and he was jerked off. The stop was characterized as one of the hardest the witness had seen. The Arkansas Supreme Court refused to submit the case to the jury. The Supreme Court of the United States, however, held that there was sufficient to go to the jury. *Comparing that case with the present it is probably fair to say that a sudden stop or jerk at a time when smooth motion is to be anticipated — as in the present case — is even worse than a hard stop at or near the time a stop of some kind is to be anticipated.*"

Where the trial court required "an unexpected jarring or jerking of unusual and unnecessary severity," the burden was placed upon the 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.

Instruction No. 19 practically amounted to a directed verdict when considered in the light of the unfair written statement obtained from plaintiff shortly after the accident where appear the following words: "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." See Exhibit 12.

Whether or not plaintiff expected the stop could only go to his contributory negligence which is not a defense. See *Padilla v. Atchinson, T. & S. Ry. Co.*, (1956) 295 P. 2d 1023, 61 N. M. 115; *Thomas, Appellant, v. Union Railway Company, Appellee*, *supra*. But in Instruction No. 19, where the court states that plaintiff can recover nothing unless the stop was unexpected, the words "in whole or in part" are eliminated from the Federal Employers Liability Act and the doctrine of contributory negligence is ^{revived}~~reviewed~~ as a complete defense. Furthermore, Instruction No. 19 revives the doctrine of assumption of risk as a complete defense wherever and whenever a stop of some kind should be expected.

The instruction also eliminates plaintiff's right to

recover if the stop, although normal, was not reasonably to be expected. It will be recalled that plaintiff assumed the train was leaving town, and started for the rear of the caboose. A jury could find that this assumption was reasonable in view of other evidence that a second stop would involve excessive and unnecessary slack action. Certainly plaintiff was entitled to assume that his fellow employees would not subject him to an unreasonable risk of harm.

POINT III.

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY GIVING INSTRUCTION NO. 20.

For convenience of the Court Instruction No. 20 is herein set forth:

Instruction No. 20

"Slack action is an ordinary and usual incident in the handling of freight trains. Therefore, the fact that there was slack action, even though it may have been severe, at the time of plaintiff's injury, does not in and of itself establish negligence on the part of the Railroad. Before you can find the Railroad negligent, you must find by a preponderance of the evidence that the engineer failed to make an ordinary, normal and reasonable stop when he acted on the signal of the brakeman Serassio."

Instruction No. 20 is defendant's requested Instruction No. 16. This instruction confines plaintiff exclusively to the manner in which the engineer made the stop when "he acted on the signal of the brakeman Serassio," and 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. Defendant's own witnesses testified that severe and consequently dangerous slack action was a necessary incident to the 20 carlength movement and stop which occurred. When this evidence is coupled to the fact that the movement and stop could have easily and practically been avoided by bringing the cars to the train rather than the train to the cars, it can be seen that a substantial part of plaintiff's case was eliminated by the instruction. We call attention to the case of *Boston & Main Railroad Company v. Meech*, 156 F. 2d 109, 111 (1 C.C.A. Cir. den. Oct. 28, 1946, 67 S. Ct. 124), where the court held that whenever there is an evidentiary basis for a finding that more could have been done to promote the safety of employees, a jury question is established on the issue of negligence.

The instruction also does violence to the doctrine of *res ipsa loquitur*. Plaintiff alleged *res ipsa* in his complaint (R. 2). The trial court properly instructed on *res ipsa* in Instruction No. 14 and told the jury in effect that severe slack action inadequately explained would warrant a finding of negligence.

The cases support submission of *res ipsa loquitur* to the jury. In *Kansas City Southern Railway Company v. Justis* (Fifth Circuit, Apr. 6, 1956), 232 F. 2d 267, 60 A.L.R. 2d 628, Certiorary denied by the United States Supreme Court, 352 U.S. 833, 1 L. Ed. 2d 53, 77 S. Ct. 49, a sudden extraordinarily violent jerk occurred caus-

ing plaintiff's injuries. The doctrine of *res ipsa loquitur* was held applicable in the following language:

"We think that the learned district court properly submitted the issue of negligence to the jury under the doctrine of '*res ipsa loquitur*' as that doctrine is applied in actions arising under the Federal Employers' Liability Act and other federal laws. The instant case is, we think, a stronger one for the application of the so-called *res ipsa loquitur* doctrine than was the *Jesionowski* case, *supra*. There the claimed negligence of the deceased brakeman might have been the sole cause of the derailment, with no other negligence on the part of the railroad. Here, the most that could be claimed against the plaintiff is his failure to act after being informed of an improper distribution of the load primarily brought about by other employees. The plaintiff had no connection with maintenance of the brakes or brake line, or with the handling of the brakes in making the stop. He was entitled to recover if his injury resulted 'in whole or in part from the negligence of any of the . . . employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its . . . equipment.' 45 USCA § 51. In the present case, once the jury found a sudden stopping and an unusual jolt or jar from which they inferred negligence, such negligence could not be chargeable solely to the plaintiff. If negligent at all, his negligence was contributory, not barring a recovery but calling for a diminution of damages, 45 USCA § 53."

In Instruction No. 20 the jury is informed that slack action, even though severe, does not in and of itself,

establish negligence on the part of the railroad. But Instruction No. 14 properly told the jury that *unexplained* severe slack action would support a finding of negligence. The two instructions are inconsistent and confusing, and the doctrine of *res ipsa loquitur* was lost to plaintiff in the shuffle. The burden was placed on plaintiff of proving that the severe slack action was negligently caused. The burden should have been on defendant under *res ipsa* of explaining the severe slack action on a non-negligent basis.

POINT IV.

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY GIVING INSTRUCTION NO. 23.

For convenience of the Court Instruction No. 23 is herein set forth:

“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.”

Instruction No. 23 is defendant's requested Instruction No. 13. This instruction contains the same vice discussed in Point III wherein attention is called to a combination of facts; first, that under defendant's testimony violent and severe slack action at the end of the train was a necessary and unavoidable result of moving a long train a distance of 18 to 20 carlengths; and second, the fact that the movement itself could have been practically and simply avoided; and third, that the decision to make the movement and the stop was made by Wonna-

cott and Serassio and not by the plaintiff. Instruction No. 23 eliminates from plaintiff's case any contention that Wonnacott and Serassio were negligent in deciding to make a movement which would involve unnecessary and unusual danger to plaintiff. This theory of liability was properly pleaded by plaintiff where it was alleged that the stop was unnecessarily violent and not reasonably to be expected.

If a jury in the exercise of its broad latitude as the fact finder could find that the stop involved an unreasonable risk of harm, and that the stop was unnecessary, defendant's negligence in making the stop at all would be a proper jury issue.

See in support of plaintiff's position *Boston & M. R. R. v. Meech*, supra, *Wilkerson v. McCarthy et al.*, 336 U.S. 53, 69 S. Ct. 413, reversing Utah Supreme Court, 187 P. 2d 188, and *Murphy v. Boston & Maine R. R.*, 65 N.E. 2d 923.

POINT V.

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY GIVING INSTRUCTION NO. 24.

For the convenience of the Court Instruction No. 24 is herein set forth:

"Negligence on the part of anyone is not to be inferred from the mere fact that the plaintiff may have been injured, and the mere fact that the plaintiff may have been injured is not evidence in and of itself of negligence on the part

of the defendant, nor of contributory negligence on the part of the plaintiff. Negligence, if any, and contributory negligence, if any, must be proved by a preponderance of the evidence in this case."

Instruction No. 24 must also be considered in the light of the fact that this is a *res ipsa loquitur* case. Instruction No. 24 tells the jury that the mere fact that plaintiff may have been injured is not "evidence in and of itself of negligence" on the part of defendant. At no time has plaintiff claimed that the fact plaintiff was injured *established* negligence. Plaintiff's contention was, and is, that the fact he was injured on the caboose is *some evidence* indicating the violence of the slack action. The violence of the slack is a fact to be established in determining whether defendant was negligent.

The law on this point is stated in 38 *American Jurisprudence* beginning at page 985, in the following language:

"While it is true that simply because an accident has occurred, negligence is not to be presumed, still, in determining the question of negligence, the fact that an accident has occurred may be and should be taken into consideration, in connection with all other facts and circumstances of the case, for the purpose of determining whether in fact there was negligence. Negligence may be inferred from circumstances surrounding the injury, if not from the fact of the injury itself."

In the footnote at page 985 of 38 *American Jurisprudence* appears the following supported statement:

"No general rule can be laid down that the mere occurrence of an accident is or is not sufficient prima facie proof of actionable negligence. * * * *Griffin v. Boston & A. R. Co.*, 148 Mass. 143, 19 N. E. 166, 1 L.R.A. 698, 12 Am. St. Rep. 526.

"Negligence, like any other fact, may be inferred from the circumstances, and the case may be such that though there be no positive proof that the defendant has been guilty of any neglect of duty, the inference of negligence would be irresistible. *Barnowsky v. Helson*, 89 Mich. 523, 50 N. W. 989, 15 L.R.A. 33."

The principle that the happening of the accident may be proper proof of negligence was recognized by this Court in *Perrin v. Union Pacific R. Co.*, 59 Utah 1, 201 P. 405. In the *Perrin* case the happening of the accident and the facts surrounding it were found to be sufficient to support a verdict for plaintiff. See also: *Patrick Wetler v. The Atchison, Topeka and Santa Fe Ry. Co.*, 277 Ill. App. 275; *Orris v. Chicago, R. I. & P. Ry. Co.*, (Mo.) 214 S.W. 125; *Southern Ry. Co. v. Smith* (Ala.) 221 Ala. 273, 128 S. 228; *Hankins v. Reimers*, 86 Nebr. 307, 125 N.W. 516; *Paulsen v. McArroy Brewing Co.*, 226 Ill. App. 605; *Grauer v. Alabama Great Southern R. Co.*, 209 Ala. 568, 96 S. 915; and *Hackley v. Southern Pacific Co.*, (Cal.) 45 P. 2d 447.

POINT VI.

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY GIVING INSTRUCTION NO. 21.

For the convenience of the Court Instruction No. 21 is herein set forth:

"If you find that the engineer made an independent application of the brakes, that fact, if you so find, does not in and of itself establish negligence on the part of the Railroad. Before you can find negligence on the part of the Railroad, you must find by a preponderance of the evidence, that applying the independent air brakes to stop as signaled by the brakeman Serassio, constituted negligence and failure to exercise reasonable care."

Instruction No. 21 is defendant's requested Instruction No. 15 (R. 25). The fallacy of the instruction can best be seen by resort to the evidence. Defendant's own witnesses testified that an application of the independent brakes would be a departure from custom and practice, would result in excessive slack action with resultant violent run-in of slack and danger to employees on the rear of the train. Defendant's position was that the independent air was not used in making the stop. We call attention to the testimony of engineer Kroescher at R. 291, 292:

"Q. Now, when you are operating a string of cars in a long train, Mr. Kroescher, what is the usual brake that you use?

"A. We generally use the service application.

"Q. And why do you use the service application?

"A. So you can stop the train.

"Q. With a long string of cars, are you able to stop the train in a short distance with independent brakes?

"A. Not — no.

"Q. Why not?

"A. Well, it will cause severe slack action, if you use the independent alone."

Kroescher went on to testify that he used the automatic rather than the independent brakes in making the stop (R. 296). He also testified that the use of the automatic brakes was the customary and proper procedure (R. 295, 305). On cross-examination Kroescher testified that use of the independent brakes would cause much more violent slack action than use of the train brakes (R. 308), and that he wouldn't use the independent brakes for reasons of safety to personnel on the rear of the train (R. 309).

With the foregoing evidentiary background, the court states in Instruction No. 21 that even though the jury believed that the independent rather than the train brakes were used, this fact in and of itself would not establish negligence on the part of the railroad company. In the light of defendant's own evidence the use of independent air by the engineer would be negligence as a matter of law. This is true because it is agreed on all sides that use of independent air would (1) cause unusual and unnecessary violence of slack action at the rear of the train, and (2) be a departure from customary, normal and safe railroading procedures.

POINT VII.

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR WHEN IT STRUCK THE ENTIRE TESTIMONY OF THE WITNESS PAUL FRANK THOMAS.

Witness Thomas testified on behalf of plaintiff that

he was in the yard office at the time of the occurrence (R. 261, 262). The yard office is about 50 to 100 feet from the eastbound mainline track (R. 264). He was somewhat uncertain as to whether he had actually seen the movement of the train on the eastbound mainline track (R. 264, 265). However, he testified that he heard "a violent run-in," and again characterized the noise he heard as "a terrific crashing, in other words" (R. 265). He also testified that he saw the caboose of the train which was almost in front of the yard office (R. 266). A short time later Thomas saw plaintiff enter the yard office (R. 263).

The court instructed the jury as follows:

"6 (a) You are instructed that you are to entirely disregard the testimony of the witness Thomas and are not to consider said testimony in arriving at your decision in this case."

Counsel for plaintiff took exception to the giving of said instruction (R. 345).

The reason given by the court in excluding said testimony can be found in his comment wherein the court stated: "Well, it takes rather a strong assumption to say that the crash he said he heard had anything to do with this train or this event." (R. 272).

That evidence is admissible even though it may involve a measure of speculation has long been the law in Federal Employers' Liability Act cases. As was stated by this Court in *Coray v. Ogden Union Railway & Depot Company*, 180 P 2d 542, at Page 544:

"If there is evidence from which the jury, as reasonable men, can find the existence of a disputed fact, it is not speculation simply because there is equally strong evidence from which they could have arrived at an opposite conclusion. The law of the United States covering this situation is as stated by Mr. Justice Douglas in the case of *Ellis v. Union Pacific Railroad Co.*, 67 S. Ct. 598, 600:

"The choice of conflicting versions of the way the accident happened, the decision as to which witness was telling the truth, *the inferences to be drawn from uncontroverted as well as controverted facts, are questions for the jury.* *Tenant v. Peoria & P. U. R. Co.*, 321 U.S. 29, 64 S. Ct. 409, 88 L. Ed. 520; *Lavender v. Kurn*, *supra*, (327 U.S. 645, 66 S. Ct. 740, 90 L. Ed. 916). Once there is a reasonable basis in the record for concluding that there was negligence which caused the injury it is irrelevant that fair-minded men might reach a different conclusion. For then it would be an invasion of the jury's function for an appellate court to draw contrary inferences or to conclude that a different conclusion would be more reasonable. *Lavender v. Kurn*, *supra*, 327 U.S. at page 652, 66 S. Ct. at page 743 (90 L. Ed. 916)."

And as was said by Mr. Justice Murphy in *Lavender v. Kurn*, 327 U.S. 645, 66 S. Ct. 740:

"It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute *or the evidence is such that fair-minded men may draw different inferences.* a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them

to be the most reasonable inference."

In the case at bar the jury should have been allowed, from the proximity of time and location, to infer that the run-in of slack heard by Thomas was on plaintiff's train, and from the nature of the sound, that it was unusually violent. When the trial court disapproved and excluded this testimony a shadow was placed over plaintiff's entire case.

The trial court was not content with excluding the evidence regarding sound of the slack but excluded the entire testimony of Thomas. Thomas' description of plaintiff shortly after the accident was as follows: "Well, I don't recall what he looked like exactly. Seemed, though, he walked in and he was white and he had one arm — don't recall which elbow was torn out and he was sick, or he said he was sick." (R. 263). This evidence indicated a serious injury immediately following the run-in of slack. It was evidence of pain and suffering and was also supportive of plaintiff's claim that his later discovered ruptured disc was caused by the accident. It will be recalled defendant denied that plaintiff was injured and contended that the disc pathology had nothing to do with plaintiff's accident. For example, note defense counsel's cross-examination of Dr. Robert Laub (R. 101, 102):

"Q. In other words, Doctor, when this condition gets to the breaking point, the straw that breaks the back, that can cause the symptoms to begin to occur, is that right?

"A. In some cases.

"Q. People rolling over awkwardly in bed with a back like that, they will start having pain?

"A. I have seen it from people who are bending over to lace their shoes or going through some motion that they don't ordinarily go through."

* * * * *

"Q. Doctor, is it not true that people with a back like this as they get a little older, why that back will have to be corrected without injury simply because it developes and the condition becomes worse?

"A. Yes. * * * "

Again, on recross, defense counsel attempted to inject doubt as to whether plaintiff was injured at the time of the accident (R. 115).

"Q. In other words, Doctor, you are assuming that the plaintiff is correctly telling you that he has never had any pain in his back prior to this time and that the first time he ever had pain in his back was after this accident occurred at Provo?

"A. Yes, that was the history that I —

"Q. And you have to assume that to be true to reach the diagnosis that you reached.

"A. Yes."

The testimony of Thomas was material and probative on the issues of negligence, causation, and damage. One or more of these issues was resolved against plaintiff by the jury. Unquestionably plaintiff was prejudiced by Instruction No. 6 A.

CONCLUSION

Plaintiff respectfully submits that the instructions given to the jury by the trial court are riddled with prejudicial error. In brief summary these instructions:

1. Erroneously required plaintiff to expect and guard against unexpected and unanticipated negligence of the defendant.

2. Resurrected the outlawed defense of assumption of risk where it required plaintiff to assume the risks of unexpected negligent stops.

3. Erroneously deprived plaintiff of the right to recover for a negligently caused severe stop if it was expected, thereby resurrecting contributory negligence as a complete defense.

4. Erroneously deprived plaintiff of the right to recover for a negligently unexpected stop if there was a normal type of braking application.

5. Erroneously deprived plaintiff of the right to recover under the Doctrine of Res Ipsa Loquitur.

6. Erroneously deprived plaintiff of the right to recover even though he proved that other members of his crew had made a stop which involved an unreasonable risk of harm and which was unnecessary.

7. Erroneously instructed the jury that use by the engineer of the independent brakes was not enough to support a finding of negligence.

8. Erroneously deprived plaintiff of the advantage of important probative evidence when it excluded the testimony of Thomas.

Any of the foregoing errors individually would warrant reversal of the case. Collectively they demonstrate a denial to plaintiff of his fundamental right to a fair and impartial trial according to law.

It is, therefore, respectfully submitted that this case should be reversed and remanded to the District Court for a new trial.

Respectfully submitted,

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