1960

Louise Olsen v. Preferred Risk Mutual Insurance Co. : Brief of Respondent

Utah Supreme Court

In The Supreme Court of the State of Utah

LOUISE OLSEN,
Plaintiff and Respondent,

—vs.—

PREFERRED RISK MUTUAL INSURANCE COMPANY, an Iowa Corporation,
Defendant and Appellant.

RESPONDENT'S BRIEF

Case No. 9179

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TEXTS CITED

CASES CITED

IN THE SUPREME COURT
of the
STATE OF UTAH

LOUISE OLSEN,

Plaintiff and Respondent,

—vs.—

PREFERRED RISK MUTUAL INSURANCE COMPANY, an Iowa Corporation,

Defendant and Appellant.

ADMISSION OF FACTS

The respondent agrees with the facts as stated by the appellant except in the following particulars: The following are facts established by the evidence.

STATEMENT OF FACTS

A. The plaintiff had driven her car to the west side of the street and out of the lanes of moving traffic at a place which would not impede any of the lanes of traffic in order to change her flat tire. (TR. 10, TR. 59) Officer Burkdoll, who came immediately after the accident and saw the actual location of her automobile was asked the following question:

"Q. Are you able to tell the jury, Officer Burkdoll, what the location of the Chevrolet automobile was, in regards to the moving lanes of traffic on the west half of Washington Boulevard?

A. It would not impede the moving lanes of traffic." (TR. 61)

Mr. Nuxoll had driven out of the eating place a few feet away from where plaintiff had stopped. He had stopped his car four to five feet to the rear of her car and honked; she walked back and briefly told Mr. Nuxoll that she had a flat tire. She then walked to the rear of her car, opened the trunk lid and bent over to remove the tools from the trunk. There was nothing to obstruct his view. She was clearly in sight and in front of his automobile. Mr. Nuxoll then drove his car forward into plaintiff, pinning her between the two cars. Mr. Nuxoll then backed up and drove forward again; striking her for the second time, then he backed up, drove out around her vehicle and away. (TR. 11 & 12)

STATEMENT OF POINTS

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THE COURT WAS CORRECT IN DIRECTING A VERDICT ON THE QUESTION OF LIABILITY.

POINT TWO

SINCE COUNSEL'S ARGUMENT TO THE JURY IS SUGGESTION AND NOT TESTIMONY, NO PREJUDICIAL ERROR RESULTED IN ALLOWING COUNSEL TO MAKE A MATHEMATICAL COMPUTATION OF GENERAL DAMAGES FOR PAIN AND SUFFERING.

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SINCE THE MATTER OF COUNSEL'S ARGUMENT IS DISCRETIONARY WITH THE TRIAL COURT AND THAT DISCRETION WAS NOT ABUSED IN THIS CASE, NO PREJUDICIAL ERROR RESULTED IN PERMITTING COUNSEL TO MOTIVATE THE JUROR'S REASONING PROCESSES BY ASKING WHAT THEY WOULD TAKE.

ARGUMENT

POINT ONE

THE COURT WAS CORRECT IN DIRECTING A VERDICT ON THE QUESTION OF LIABILITY.

The Supreme Court has long held that notwithstanding a question of contributory negligence is ordinarily one of fact, where undisputed facts lead reasonable minds to one conclusion, the Court must declare such conclusion as a matter of law. (See *Maybee v. Maybee,* 11 Pac. 2d, 973; *Balle v. Smith,* 17 Pac. 2d 233.)

May it be noted further that when the plaintiff went back to the Nuxoll automobile she was not there long. She only had a few seconds to see Nuxoll. She was there just long enough to tell him that she had a flat tire and that ~~that~~ was the reason she was not moving, and then went back. She did not have a chance to see his actions. He stayed in the car while she notified him the reason she was stopped was because she had a flat tire. There was not any extended conversation. She proceeded directly to open her trunk lid with her back to Mr. Nuxoll and leaned in for the tools. It was light with perfect visibility

for Nuxoll. He knew that she was there. Now the thing of particular significance is that at this time, even if the plaintiff were negligent, which the respondent certainly does not feel she was; yet assuming that she was — that this moment when the plaintiff is directly in front of Mr. Nuxoll's car standing in clear view of him, not facing him and leaning against her trunk, Mr. Nuxoll now entirely controlled the situation. He knew where she was, he knew that if he drove forward he would strike her. His actions now entirely would determine whether there was an injury. Yet in spite of this, Mr. Nuxoll drove directly into the plaintiff, backed off, and drove into her again. No reasonable mind could say that the sole proximate cause of the injury was not the negligence of Mr. Nuxoll. The Court was entirely correct in determining that no reasonable mind could feel that the plaintiff was guilty of negligence which was a proximate cause of the injury. (See the following cases:)

Cederloff v. Whited, 169 Pac. 2d 777;
Hart v. Kerr, 175 Pac. 2d 475;
Toomers Estate v. U.P.R.R., 239 Pac. 2d 163;
Peterson v. Nielsen, 343 Pac. 2d 731;
McMurdie v. Underwood, 346 Pac. 2d 711;
Girdner v. Union Oil Company, 13 Pac. 2d 915;
Crompton v. Ogden Union Railroad Co., 235 Pac. 2d 515;
Cox v. Thompson, 254 Pac. 2d 1047;
Paulos v. Market Street, 28 Pac. 2d 94;
65 *Corpus Juris Secundum,* pages 742, 743, 744;
Knutson v. Oregon Short Line, 2 Pac. 2nd 102.

POINT TWO

SINCE COUNSEL'S ARGUMENT TO THE JURY IS SUGGESTION AND NOT TESTIMONY, NO PREJUDICIAL ERROR RESULTED IN ALLOWING COUNSEL TO MAKE A MATHEMATICAL COMPUTATION OF GENERAL DAMAGES FOR PAIN AND SUFFERING.

Counsel must be of as much aid to the jury as possible in assisting them in reaching their verdict. To ask a jury to proceed up a "blind alley in the dark" simply is not reasonable. The reasons that have been given approving the type of argument used in the instant case are:

(1) It is necessary that the jury be guided by reasonable and practical considerations.

(2) That the trier of the facts should not be required to determine the matter in the abstract and relegated to a blind guess.

(3) The argument that the evidence fails to provide a foundation for per diem suggestion is unconvincing because the jury must, *by that or some other reasoning process,* estimate and allow an amount appropriately tailored to the particular evidence in the case as to pain and suffering or other such element of damages.

(4) That per diem suggestion of counsel does no more than present *one method of reasoning* which the trier of the fact may employ to aid him in making a reasonable and sane estimate.

(5) That per diem arguments are not evidence but are used only as illustration and suggestion.

(6) The claimed danger of such suggestion being mistaken for evidence is an exaggeration and if danger is present it can be dispelled by the court's charge.

(7) Opposing counsel is equally free to suggest his own amounts.

These are the reasons given by the court in *Ratner v. Arrington,* (Dist. C of App. Florida, April 9, 1959) 111 So. (2) 82 after a skillful and competent analysis of the problem. This decision is one of the most recent opinions on this problem. The comment on this decision by the Editor-in-chief at 23 *Nacca Law Journal* 257 is worth repeating here:

> "Chief Judge Carroll's analysis of the crucial issue, presently clamoring for resolution in many states, whether a trial judge has discretion to permit counsel with the aid of a chart or blackboard to suggest in summation to the jury a per diem or other mathematical formula for measuring damages for pain and suffering, is customarily meticulous, straightforward, just and lucid. Chief Judge Carrol's cogently written extremely convincing opinion is unreservedly recommended to the personal injury bar as an extraordinarily skilful abridgement of the best arguments which have been advanced on both sides of the question of the propriety of a per diem formula for damages. The result is an opinion lawyers will want to read, not just respect. His patient and perceptive critique of the utility of the mathematical formula in assessing damages for pain and suffering is a timely and telling corrective to the stultification

of the flawed opposite holding in Botta v. Brunner which, by banning such per diem measurement and barring counsel from even comment upon the amount prayed for in the ad damnum clause went far to leave the jury wrapped in a Grand Banks fog."

"Argument to jury which constitutes an example in arithmetic to show jury how to compute damages has been held proper." 88 C.J.S. 378.

Trial judges in the Federal system, sitting as triers of the fact, have been sustained in approaching the problem in this manner. In *Imperial Oil, Limited* (U.S. Ct. App. 6th Cir. June 5, 1956) 234 F (2) 4, the court sustained a trial judges findings (sitting without a jury) in using the following approach: by the use of a mathematical formula, involving a sliding scale of varient amounts per day and month, geared to gradations of pain. The circuit court observed that although novel, this was not an arbitrary or unreasonable approach to the problem presented and its application was so adjusted as to be consistent with the evidence and to reach a result which does not appear to us to be manifestly unjust.

Several courts have met this problem since the decision in *Botta v. Brunner* and have rejected the conclusion reached in the Botta case. Per diem assessment of damages for pain and suffering makes more sense that the "by guess and by golly" method. *Continental Bus System, Inc. v. Toombs* (Tex. Civ. App. 1959) 325 S.W.

(2) 153; *Ratner v. Arrington* (D.C. App. Florida 1959) 111 So. (2) 82; *Johnson v. Brown* (Nev. 1959) 345 P. (2) 754.

There is no error in permitting counsel to use a chart in his final argument to the jury. *Miller Petroleum Transporters, Ltd. v. Price* (Miss 1959) 114 So. (2) 756.

Several recent cases approve with varying degrees of enthusiasm counsel's right, in arguing the issue of the amount of the damages to suggest the use of a per diem or other mathematical formula as an aid to an accurate estimate of the award for pain and suffering. *Boutang v. Twin City Motor Bus Co.* (1956 Minn.) 80 NW (2) 30; *Flahetty v. Minneapolis & St. Louis R. Co.* (1958 Minn.) 87 NW (2) 633; *Four County Electric Power Asso. v. Clardy,* (1954 Miss.) 73 So (2) 144, 44 ALR (2) 1191; *Arnold v. Ellis* (1957 Miss.) 97 So. (2) 744; *J. D. Wright & Son Truck Line v. Chandler,* (Tex. Civ. App.) 231 SW (2) 786; *Ratner v. Arrington* (D.C. App. Florida 1959) 111 So. (2) 82; and the recent western case of *Johnson v. Brown* (Nev. 1959) 345 P (2) 754.

Counsel's final statement on the subject removed any doubt that his statements were anything but suggestions:

> "I'm just asking you to consider what would be a reasonable amount per day for what she's gone through. * * * Now if that's ridiculous then you set it up by any other means that you know." (Tr. 128)

Counsel's argument in the instant case does no more than present one method of reasoning to the jury and

the jury is free to use the method it wishes. The Supreme Court of Nevada on October 29, 1959 has wholly rejected the Botta case. The decision in *Johnson vs. Brown* (Nev. 1959) 345 P(2) 754 is persuasive because of the similar practice in that state and our state of advising the jury of the amount of the prayer and instructing the jury that their verdict may not exceed that amount. In that case counsel for plaintiff suggested 10c per minute or $144.00 (*as defense counsel did in the case at bar*) and the court observed at 345 P(2) 759:

> "We feel therefore that the preferable rule in this state in view of our statute and the custom and practice prevalent thereunder is that whether, under the circumstances of the particular case, the arguments of counsel suggesting a mathematical basis for fixing damages for pain and suffering is an improper invasion of the rights of the jury is to be determined by the trial judge in the exercise of judicial discretion."

It should be noted that defense counsel used the "per diem" and "per minute" argument in an effort to make plaintiff's claims appear to be ridiculous.

POINT THREE

SINCE THE MATTER OF COUNSEL'S ARGUMENT IS DISCRETIONARY WITH THE TRIAL COURT AND THAT DISCRETION WAS NOT ABUSED IN THIS CASE, NO PREJUDICIAL ERROR RESULTED IN PERMITTING COUNSEL TO MOTIVATE THE JUROR'S REASONING PROCESSES BY ASKING WHAT THEY WOULD TAKE.

The trial judge should be left large discretion in permitting and restraining counsel's argument and his rulings should generally be deferred to an appeal because of his better position to know the meaning, construction and effect of argument. 9 *Blashfield* 432.

The advocate should be allowed a wide latitude in argument. This well established rule is well expressed in the case of *Tucker vs. Henniker,* 41 N.H. 317.

> "The counsel represents and is a substitute for his client. The largest and most liberal freedom of speech is allowed and the law protects him in it. His illustrations may be as various as the resources of his genius; his argumentation as full and profound as his learning can make it."

As stated at 88 C.J.S. 357-358:

> "Counsel is allowed much latitude in arguing. He may draw conclusions from the evidence on his own system of reasoning, although such inferences as stated by counsel are inconclusive, improbable, illogical, erroneous, or even absurd."
> *Lawyer vs. Stansell,* 250 N.W. 887.
> *Hayes vs. Coleman,* 61 N.W. (2) 634.
> *Seeley vs. Manhattan,* 61 A. 585.
> *Guest vs. Guest,* 235 S.W. (2) 710.
> *Seaboard Airline Ry. vs. Horning,* 89 S.E. 493.

The latitude which fairly and properly was extended to plaintiff's counsel in the present case was not an abuse of discretion on the part of the trial judge.

CONCLUSION

It is respectfully submitted that no prejudicial error occurred in the court below and that the judgment of the trial court should be affirmed.

Respectfully submitted,

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