

1969

**Pearce L. Hines v. Nile W. Harbertson and Gil B. Seeley :
Respondent's Brief**

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**IN THE SUPREME COURT OF THE
STATE OF UTAH**

PEARCE L. HINES,

Plaintiff-Respondent

vs.

NILE W. HARBERTSON and

GIL B. SEELY,

Defendant-Appellant

Case No.
11682

RESPONDENT'S BRIEF

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STATEMENT OF FACTS

There is and was no conflict on the facts involved in this trial. The automobile accident involved three cars proceeding north on Hickory Road, Hill Air Force Base, a two lane road (T-10). It was daylight. The driver of the first vehicle, a Mustang, was on active duty with the U.S. Air Force reporting to Hill Air Force Base (T-4). He had never been stationed at Hill Field (T-4). He was driving north on said road when he observed a sign which stated "NO CIVILIAN VEHICLE BEYOND THIS POINT" (T-11). Seely assumed that the sign referred to him and stopped (T-11). His stop was in the lane of traffic (T-12),

although he could have driven off the side of the road. He was stopped for several seconds prior to the time of impact (T-15). He had stopped in a normal fashion (T-7), not jumping on the brake or panicing (T-7). The stop occurred approximately 10 yards past the sign previously described. At the time, there were no cars coming from the opposite direction (T-15).

The plaintiff, Hines, came up behind Seely. He observed Seely's brake lights go on and he came to a normal stop (T-67), not a sudden stop (T-67), approximately 10 feet to the rear of the Seely vehicle (T-67). After coming to a stop, Hines put his foot on the clutch, shifted into second gear, reached for a cigarette at which time he was rammed from the rear by the vehicle being driven by the defendant Harbertson (T-68).

The impact knocked him into the vehicle owned by Seely, causing either \$89 or \$98 damage to the Seely vehicle. The Hines vehicle was knocked 127 feet from the point of impact (T-69). One side of the frame was knocked forward 7 inches and the left to a 45 degree angle. The damage to the vehicle was \$564 (T-74).

The defendant, Harbertson, whose impact caused the damage complained of, was driving a 1968 Plymouth that was damaged in the approximate amount of \$600 (T-17). Each wheel laid down 45 feet of skid marks prior to the impact (T-20).

The road, at the point of impact, was a straight road (T-22). When Harbertson was approximately 100 feet behind the Hines vehicle, he looked to the left at a warehouse (T-23). When he looked back, he was 50

feet away and unable to stop (T-23). He stated that had he not looked at the warehouse, he would have been able to stop in time to avoid the collision (T-25 and (T-26). The defendant, Harbertson, who was an employee of Hill Air Force Base, completely familiar with the highway, described the road as follows:

"There is not a definite curve. There is a Y about, Oh, a good block beyond the point of impact, where one road goes this way and the other kind of takes an off-shoot, not a real curve. There is very little turn to the road" (T-28).

Harbertson never did see the Seely vehicle until after the impact (T-24), although he knew he had to expect traffic on that road (T-31).

The plaintiff, Hines, is 48 years old, married, with four children (T-65). A normally right handed man, he lost his right arm in Belgium January 4, 1945 (T-66). He overcame said disability and worked his way to a GS - 12 Equipment Specialist Ordinance Supervisor (T-66), and taught himself to hunt, fish, and bowl left handed with modifications to his equipment (T-67). Since that accident, he has been unable to engage in any of his normal recreational pursuits (T-76, 77, 78), and has pain each day.

At the time of the accident, the plaintiff, Pearce Hines, had some arthritis of the spine (T-38), but his back had never bothered him (T-77). Dr. Gardner, who had treated the plaintiff for a substantial period of time and who had operated on him (T-43), testified that Hines had been asymptomatic prior to the accident. That while Hines had obviously had the con-

dition, he did not know he had it and that there was nothing in his prior treatment of Pearce Hines to indicate that he had ever had any difficulty or back problem prior to the time of the accident (T-44 and T-45). The doctors examination, immediately prior to trial, indicated the objective signs as limitation of motion and muscle spasm tenderness (T-42), and that he has a permanent impairment of his back (T-42 and T-43) that will permanently prevent him from engaging in most sport activities or heavy physical work and which require movement of the body and particularly movement of the spine (T-47). Dr. Gardner's testimony was uncontradicted.

ARGUMENT

POINT 1

THE COURT ERRED IN GIVING NO INSTRUCTIONS TO THE JURY ADVISING THEM OF THEIR DUTIES, DEFINING LEGAL TERMINOLOGY, OR FURNISHING GUIDE LINES FOR THEIR DELIBERATIONS.

The defendant Harbertson is appealing to this Court because of the alleged failure of the Court to give certain cautionary instructions. His exceptions are set forth in full as follows:

"The defendant further excepts to the Court's failure to give the jury cautionary instructions with relation to their duties as jurors. The fact that their verdict should not be based upon sympathy, conjecture or speculation. That their verdict should be confined solely to the evidence produced in Court." (T-120)

The law in Utah relative to exceptions was laid down in *Employers' Mut. Liability Ins. Co. of Wisconsin vs Allen Oil Co.*, 123 U 253, 258 P2d 445 as follows:

“The appellants’ objection in the trial court to instruction No. 19 was couched in general terms, viz ‘on the grounds and for the reasons that such instruction is not supported by, and is contrary to, the law and the evidence. That it is misleading, and can only serve to confuse the jury.’ The objection failed to comply with the requirements of Rule 51, Utah Rules of Civil Procedure, that ‘In objecting to the giving of an instruction, a party must state distinctly the matter to which he objects and the grounds of his objection.’ One of the purposes in requiring counsel to make objections to instructions in the trial court is to bring to the attention of the court all claimed errors in the instructions and to give him an opportunity to correct them if he deems it proper. The objection should be specific enough to give the trial court notice of the very error in the instruction which is complained of on appeal. But an objection that an instruction is ‘not supported by, and is contrary to, the law’ lacks specificness and does not direct the court’s attention to anything in particular.”

It will be observed that he did not specifically object to the failure to give JIFU Instruction No. 1.1, 1.5, 1.8, or 1.13; nor did not request or submit any instructions for the Courts approval.

Further, error cannot be based upon failure to give a particular instruction when no request therefor is made, *STate vs Lee Foo Lun*, 45 U 531, 147 Pac 488; in re *Hanson's Will* 50 U 207, 167 Pac 256; *Salt Lake and U. P. Union RR vs. Schram*, 56 U53, 189 Pac. 90; *Taylor vs RR*, 61 U 524, 216 Pac 239; *State vs McNaughton*, 92 U 99, 58 P2d 5.

The duty of a court to give cautionary instruction is not the same as is the duty to give instructions relative to the issues on the case. The giving of cautionary instruction is within the sound discretion of a court, *Wilcox vs. Coons*, Missouri, 241 SW2d 907; *State vs. Black*, Oregon, 193, 295, 236 P2d 326; and there is authority to the effect that cautionary instructions should not be given if the same is unnecessary, Missouri, *Morris vs. Dupont deNemours and Company*, 351 Mo. 479, 173 SW2d 39; Iowa, *Clark Vs. Hubbell*, 249 I 306, 36 NW2d 905; *Wimberley vs. City of Paterson*, NJ 183, A2d 691; *Johnson vs. Nathan*, 161 Neb. 399, 73 NW2d 398; Georgia *Butler vs. Cane*, 100 SE2d 598.

The refusal to give a cautionary instruction is in error unless it appears that the discretionary power of the court to give or refuse to give an instruction has been abused, *Beyer vs. Martin*, 120 Iowa Appeals 50; *Arnold vs. RR Co.*, Mo., 154 SW2d 58; see also, *Butler vs. Cane*, Georgia Supra.

It has been held that it is not improper to instruct a jury that they are not to be influenced by sympathy or prejudice providing the circumstances warrant, *Hough vs. Miller*, Idaho, 44 NE2d 228; *Wedhemer vs. Cincinnati State Railway Co.*, Ohio, 42 NE2d 460. However, in *Mis-*

souri, *Johnson vs. St. Louis RR Co.*, 173 Mo. 307, 73 SW-2d 173 has held that it is improper to do so when nothing has transpired to indicate that the jurors are not aware of their duty. In a proper case, the Court should give such an instruction when requested so to do, *Shanks vs. RR Co.*, 98 Wash. 509, 167 Pac. 1074.

The defendant Harbertson does not claim that there was any evidence upon which the court should have been required to give such an instruction. Nor, has he contended that the court abused his discretion.

His appeal is predicated upon the conception that a court has the same obligation to instruct the jury for cautionary rules as it does on the principle facts and issues. He correctly states further the latter rule as stated in 53 *AM JUR Trial*, Section 510. The rule is again stated similarly in 53 *AM JUR Trial*, Section 512 as follows:

“It is a well-stated general principle that the instructions given by the trial court should be confined to the issues raised by the pleadings in the case at bar and the facts developed by the evidence in support of those issues or admitted at the bar. In other words, the particular matters to be covered in the instructions depend upon the issues joined by the pleading and supported by the evidence.”

The Utah cases that he cites are in direct support of this rule, *Sutton vs. Otis Elevator Co.*, 68 U 85, 249 Pac. 437; *Hanks vs. Christensen*, 11 U2d 8, 354 P2d 564, and *Johnson vs. Cornwall Warehouse*, 16 U2d 186, 398 P2d 24. The cases all can be viewed in light of the

courts statement in *Hanks vs. Christensen*

“The criticism of the substance of the instructions relates mainly to the charge that they do not spell out the correct standard of care.”

None of these cases refer even by inference to a duty to give what the defendant Harberston himself recognizes to be solely cautionary instructions.

The court having directed a verdict against the defendant Harbertson correctly submitted the issue and element of damage to the jury. The defendant Harbertson does not contend that the damage instruction so given was incorrect so that the only issue for the jury to consider was, in fact, instruction upon damages and properly so.

The failure to give cautionary instructions rests upon the sound discretion of the trial court. No abuse of that discretion was alleged or proven.

POINT II

THE TRIAL COURT ERRED IN DIRECTING THE VERDICT AGAINST THE DEFENDANT HARBERTSON.

The plaintiff brought this action against Nile W. Harbertson and Gil B. Seely charging that they were guilty of joint and concurrent negligence. Both parties answered charging contributory negligence.

At the conclusion of the evidence, the plaintiff made a motion to find that the plaintiff was guilty of no negligence or contributory negligence as a matter of law.

(TR-111). The Court granted that motion (TR-115). Neither party has raised any issue as to the correctness of the motion or of the ruling thereon. As this matter stands, the plaintiff was not and could not be found guilty of negligence or contributory negligence.

The plaintiff further made a motion to find both parties guilty of negligence as a matter of law and further to find the issues of liability in favor of the plaintiff and against the defendants and each of them as a matter of law (TR-111).

The defendant Seely made a motion asking the Court for a non-suit and to find the defendant not guilty of negligence as a matter of law, or in the alternative, that if said defendant Seely was guilty of negligence, that is was not a proximate cause of plaintiff's injuries (TR-112).

The Court granted the plaintiff's motion finding the defendant Harbertson liable as a matter of law (TR-115) and at the same time, granted the defendant Seely's motion for non-suit. (TR-115).

The defendant Harbertson has taken exception to the Courts ruling finding him liable as a matter of law, and has raised this issue on appeal.

The testimony of the defendant Harbertson himself is conclusive on this point, and as a consequence, is set out in detail as follows:

"Q. Is there any possibility that maybe you could have turned out, and avoided these vehicles?

"A. I did partiall turn, but not very much.

"Q. Well, what do you estimate your speed to be at the time of impact? When you hit Mr. Hines?

"A. If I had had ten more feet, I'd have been stopped. So I think I was probably down to ten miles an hour, or less.

"Q. Didn't it drive his vehicle ahead several feet? The impact?

"A. Well, he rolled.

"Q. You don't know how many feet he rolled?

"A. No, sir, I don't. I don't know how many feet he rolled.

"Q. Do you think, if you had been looking straight down the highway, that you would have been able to have got that other ten feet to have stopped?

"MR. MIDGLEY: We'll object to that, as calling for a conclusion.

"THE COURT: Oh, I'll sustain the objection to the form of the question. You can rephrase it, if you like, Mr. Murray.

"MR. MURRAY: Q. Mr. Harbertson, do you have an opinion—You said first of all ten feet more and you would have been stopped?

"A. Yes, sir.

"Q. And would this time you were looking at the warehouse, had you been looking straight ahead, do you have an opinion as to whether this would have given you enough time to make up for that ten feet?

"A. I think I would have stopped, if I had realized they were slowing down, quicker.

"Q. If you had been looking straight ahead?

"A. Right." (TR-24, 25, 26).

It will be seen that the defendant Harbertson admitted that had he been looking at the road, he would have seen the vehicle and could and would have stopped

in time to avoid the impact.

Dr. William James Gardner, the only physician to testify, gave his opinion that the impact was responsible for the results that the plaintiff Hines has and the disability which he has now and will have in the future (TR-43).

There was no conflict in the evidence. There were no other witnesses that in any way cast any doubt upon the defendant Harbertson himself, and no evidence upon which anyone could reasonably conclude that said defendant Harbertson was not negligent and that such negligence was a proximate cause.

The defendant Harbertson has not contended on appeal, nor did he do so during the trial, that the plaintiff Hines was in any way negligent, nor does he raise the issue of the correctness of the trial courts ruling this appeal. It is submitted that he has waived any right to contend that the plaintiff Hines was in any way negligent.

It does not avail the defendant Harbertson to raise the issue as to the purported negligence of the defendant Seely.

The rule is well stated in 52 *AM JUR Torts, Section* 110:

“A person who joins in committing a tort cannot escape liability by showing that another person is liable also; that a third person co-operated in the wrong is no justification for the misconduct of the defendant. The general rule as to this matter is that joint tort-feasors

are jointly and severally liable. Hence, a tort jointly committed by several may be treated as joint or several at the election of the aggrieved party.”

Neither is the defendant Harbertson able to claim that the rule heretofore stated is applicable because of some right of contribution. The rule relative thereto is stated further in 18*AJ2d* Page 44 as follows:

“The general doctrine that one of several persons equally situated who has been compelled to bear more than his equitable share of a common burden is entitled to contribution from the others who have borne less than their respective shares has been subjected to a general qualification in cases where the common burden is a joint liability of such persons as tortfeasors or wrongdoers. In the absence of a statute in the particular jurisdiction governing the right, it has been frequently declared judicially that as among or between joint wrongdoers or tort-feasors there can be no contribution, and that one of several persons who become liable to another for a wrong cannot enforce contribution from his co-wrongdoers although he is compelled to discharge the whole or more than his share of such liability.”

The above rules have been adopted by the Supreme Court of the State of Utah in *Hardman vs. Matthews*, 1 U2d 110 262, P2d 748. In the above case, the plaintiff sued defendants for injuries arising out of an automobile collision. The defendant sued to interplead the

driver and owner of the car in which plaintiff was driving. Claiming with that, the driver as a sole cause of the injury or at least a contributory cause, and that they were entitled to contribution from joint or concurring tort-feasors. The Court, speaking through Justice Henroid said,

“If the negligence of the interpleaded parties were the sole proximate cause of the injuries as defendants maintain, the latter would have a complete defense to the action without the joinder. If actively they were jointly or concurrently negligent with defendants, joinder would avail the latter noting since contribution cannot be had between joint or concurring tort-feasors, in a case like this, unless sanctioned by statute, there being none such in Utah.”

The defendant Harbertson had no right either to cause the defendant Seely to be joined or for contribution therefrom.

The defendant Harbertson's contentions upon Point II are without foundation or merit.

POINT III

THE DAMAGES FOUND WERE EXCESSIVE.

Dr. William James Gardner, Jr. testified at the trial as follows: (TR-61)

“Well, primarily his difficulty (Hines) is confined to his back. His low back, and the lumbar area. Where he has spasm, limitation of motion and tenderness. These are all objective findings. Then he has subjective complaints of pain.

“Well, I presume that it’s a combination of muscular and ligamentous injuries that occurred at the time of the accident, superimposed upon a pre-existing condition of osteoarthritis.

“That he was asymptomatic as regard to any pre-existing physical condition prior to the time of the accident (TR-43) and that on the basis, of the history, the repeated physical examination that he had performed that the man (Hines) has a permanent impairment of his back.”

The Court instructed the jury in part as follows:

“Where the result of an accident is to bring into activity a dormant disease or one to which the injured person is predisposed, the person so causing such activity is liable for the entire damages which ensue as a proximate result of the accident.”

The defendant Harbertson made no exception or objection to said instruction and it is respectfully submitted that the above instruction is a correct statement of law. The rule is set forth in *22AM JUR 2d Damage Section 123, Page 175 as follows*:

“The general rule is that where the result of the accident is to bring into activity a dormant or incipient disease, or one to which the injured person is predisposed, the defendant is liable for the entire damages which ensue, for it cannot be said that the development of the disease as a result of the injury was not the consequence which might naturally or ordinarily follow as a result of the injury, and therefore, the negli-

gent person may be held liable therefor. If a latent condition itself does not cause pain, suffering, etc., but that condition plus an injury caused such pain, the injury, and not the latent condition, is the proximate cause of the pain."

See also, *Moyer vs. Merrick, Colorado*, 155 Col. 73, 392 P2d 653; *Morrison vs. Hanson, Conn.*, 20 A2d 624; *Lockwood vs. McCaskill, NC*, 138 SE2d 541; *Meeks vs. Yancey, Tenn.* 311 SW2d 329; *Gowdey vs. U. S.*, Michigan, 271 Fed. Supp. 733; *Nownes vs. Hillside Lounge, Inc.*, 179 Neb. 157, 137 NW2d 361.

Based upon that evidence, the instructions and the further statement of the doctor to the effect that:

"Hines could at all times in the future expect that sports activity or heavy physical work which require movements of the body, and particularly of the spine.

"These movements tend to bring the muscles, ligaments and joints into play, and, when these joints have disease in them, the muscles about the joints try to splint the spine, so that it doesn't move as much, because that causes pain." TR-47

It is submitted that when one considers that the accident occurred on March 27, 1968 and the symptoms as found by the doctor were still present on May 1, 1969 and were permanent; and when one further considers that at the time of the accident that the plaintiff was a 47 year old man, it is respectfully submitted that the jury verdict of \$9,000 was modest, and that the remittur of \$1,000 ordered by the court was indeed unnecessary and incorrect.