1967

Robert Kingsley Wells v. The Denver & Rio Grande Western Railroad Company : Appellant's Brief

IN THE SUPREME COURT OF THE STATE OF UTAH

ROBERT KINGSLEY WELLS,

Plaintiff & Appellant,

vs.

THE DENVER & RIO GRANDE WESTERN RAILROAD COMPANY, a corporation,

Defendant & Respondent.

Case No. 10605

APPELLANT'S BRIEF

Appeal by Plaintiff and Appellant from a Judgment in favor of Defendant and Respondent Entered by the District Court of Salt Lake County, the Honorable Merrill C. Faux, Judge, Presiding

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PRELIMINARY STATEMENT

The parties will be referred to as in the court below.

STATEMENT OF THE KIND OF CASE

This is an action for damages for personal injuries received in a collision at defendant's crossing between defendant's engine and a car in which plaintiff was a passenger.

DISPOSITION IN THE LOWER COURT

The case was tried before the court sitting with a jury. At the close of plaintiff's testimony, the court directed a verdict against plaintiff.

RELIEF SOUGHT ON APPEAL

Plaintiff seeks reversal of the directed verdict and an order granting a new trial.

STATEMENT OF FACTS

The collision out of which this action arose took place and occurred at defendant's crossing at Fourth North Street in Salt Lake City, Utah, at approximately 12:12 o'clock A.M. on the 15th day of January, 1964. (R. 68, 69). Plaintiff was a passenger in an automobile being driven westerly across the crossing by Lorne O. Lawrence. The train involved in the accident consisted of a switch engine being operated on defendant's track in a southerly direction, pulling a car and a caboose. (R. 137).

The crossing consists of eight sets of tracks, the track in question being No. 8, proceeding across in a westerly direction. Introduced into evidence at trial was a scale diagram prepared by Bush & Gudgell, Inc., Engineers, at a scale of one inch equal to 20 feet. (Ex. 1P). The diagram shows that the first seven tracks are generally parallel, proceeding in a north-south direc-

tion. The D&RG track in question from the north comes in at an angle from the northwest. See photographs (Ex. 3P-15P and 18D-21D), Exhibits 18D-21D, having been taken the day after the accident, and 3P-15P in October or November, 1965.) (R. 87, 88, 102, 103). The evidence showed that the crossing in question is within the city limits and that the only warning of this crossing is a railroad crossing sign. (Ex. 5P, 10P, 20D). There was no crossing watchman and no flashing light or gate to warn of the particular train in question. (R. 71, 79, 141). The scale diagram shows that the distance from the first set of tracks to the D&RG track is 135 feet. There are no obstructions between the entrance of the crossing and the D&RG track looking north of the crossing. (R. 72, 73).

Lorne O. Lawrence was employed by the Union Pacific Railroad Company as a pipefitter and was giving the plaintiff a ride home from the Union Pacific Shop where the plaintiff was also employed. Plaintiff's regular ride to and from work was with a fellow employee who had his day off at the time in question, and he had arranged with Mr. Lawrence to give him a ride home from work on one day a week. (R. 78). Mr. Lawrence customarily would drop Mr. Wells off on Ninth North, with Mr. Lawrence proceeding west from that point to his own home. Mr. Lawrence gave this ride to Mr. Wells as a favor. (R. 77-79). Mr. Lawrence described the lighting conditions at the crossing in question as being very poor, there being a light on the east and two to the west of the crossing by some

buildings to the north and south. (R. 79, 80). There were numerous lights in the background looking to the north from the crossing by reason of lights from a refinery and houses and a small business building. (R. 73, 74, 81). The overpass at Fifth North was not completed at the time of the accident, and Mr. Lawrence described the crossing in question as being a heavily traveled crossing, both generally and during the hours around midnight. (R. 82).

After work on the night in question Mr. Lawrence met plaintiff and proceeded on his way home, he driving and Mr. Wells sitting on the right side of the front seat. He pulled out of the shop and drove a block east and then south on Third West to Fourth North Street, where he made a right turn and proceeded west to the railroad crossing, driving with his headlights on. (R. 83). Lawrence drove to the railroad tracks, stopped the car, looked both ways, and then proceeded across the tracks at approximately 10 miles per hour. As he proceeded across the tracks, he continued at a uniform speed of 10 miles per hour, looking in both directions. He was looking for possible railroad traffic on any one of the eight sets of tracks, coming from either direction. He did not see any lights or hear any whistle, continually moving at a slow speed. The next thing he knew they were loading him in the ambulance. (R. 84, 85).

Damage was done to the left front pilot footboard of the engine and to the right front fender, hood, door,

windshield and frame of the automobile. (R. 69, 70). The collision was described as between the left front corner of the engine and the right front corner of the automobile. (R. 160). The switch engine proceeded south, past the intersection 204 feet before coming to a stop, and the car moved southerly along the tracks 80 feet from the point of impact. The point of impact was located 27 feet north from the curb line of Fourth North Street at the track in question. (R. 69, 70, 71). (Exhibit 2P). The windows of the car were up. (R. 89).

Lawrence testified that he had crossed this same crossing on numerous other occasions and was generally familiar with it. While approaching the crossing, when he sees equipment approaching on the tracks, he usually stops before crossing the first track, for the reason that he never knows what direction other trains may come from. For this reason, his usual procedure, once ascertaining that the way is clear, is to start across and continue moving over all of the tracks. (R. 104, 105).

Plaintiff called as a witness the engineer of the train involved, Lawrence William O'Driscoll. Mr. O'Driscoll testified that he was on the right side of the engine and could not see to the left; that he relied entirely on the fireman and the switchman, who were sitting on the left. The fireman has visibility to the left and front of the engine as it is moving forward. (R. 135-137). Mr. O'Driscoll testified that he was familiar with the D&RG book of rules, and in particular with Rule 937, which reads:

"An engineman must use the utmost caution to prevent striking persons, vehicles, [stock] or other obstacles."

And further with Rule 949, with respect to the duties of the fireman:

"While engine is moving, and when his other duties permit, fireman must keep a careful lookout, giving engineman instant and understandable notice of any hand, lantern, fusee, or fixed signals, or conditions that affect the train movement. He must also be alert for signals from train or engineman of other trains and communicate same, promptly, to engineman."

Mr. O'Driscoll testified that as the train approached the crossing in question, it takes a long gradual curve to the right. (R. 139, 140). He further testified that he was traveling at approximately 20 miles per hour, approaching the crossing and relying entirely on the fireman for lookout to the front and left; that the first and only warning received from the fireman was that he hollered "Big Hole," and that just about the time he hollered "Big Hole," he hit the car in question. He testified as follows, (R. 141, 142):

"Q So, as far as any westbound traffic was concerned, you were relying entirely upon the fireman?

"A Yes, sir.

"Q And I will ask you to state whether you ever received any word—notification from the fireman as to an automobile being on those tracks

as you came along, approaching nearer and nearer to that crossing?

"A No until we got pretty near to the crossing.

"Q. What happened ~~you~~ when you got 'pretty near to the crossing?'

"A. He hollered 'Big Hole.' I went to emergency.

"Q At the time he hollered Big Hole,' did the accident happen?

"A Yes, about that time.

"Q Just about the time he hollered 'Big Hole,' you hit something?

"A Yes, sir.

"Q Up until the time you hit something, you had never seen anything at all that you hit?

"A That's right.

* * *

"Q Did you ever see the object you hit before you hit it?

"A No, sir.

"Q And, up to the point where the fireman yelled 'Big Hole it,' had you ever slowed down the engine?

"A No."

On cross examination Mr. O'Driscoll testified that he blew the whistle for the particular crossing, giving two longs, a short, and a long, which is the pattern which he always follows when he approaches a crossing, according to the rules of the railroad. (**R. 144**).

Plaintiff called Raymond A. Jaensch as a witness. Jaensch testified that he witnessed the collision. He stated that he was in the vicinity of a light pole just short of halfway between Fourth North Street and Fifth North Street. He was walking on a roadway northerly, between the Rio Grande mainline track and the U. P. tracks. He identified the pole as the one labeled "Power Pole" on the scale diagram. This power pole, according to the scale of the diagram, is some 280 feet north of the crossing. Jaensch testified that he observed the train approaching the crossing, traveling at between 20 to 30 miles per hour. (R. 162). He observed the automobile from some 25 feet before reaching the first track and moving across the crossing, and for some reason just kept watching the automobile moving at a uniform speed to the point of the accident. (R. 155, 161).

> "A Did the car move uniformly across the crossing?
>
> "A Yes; this is one of the reasons I continued watching—it never hestitated or anything. It continued at an even speed."

The train started to blow the whistle at approximately Fifth North in a sequence of whistles. The whistle ended somewhere between the point where Jaensch was standing and the crossing, Jaensch being unable to pinpoint exactly where. (R. 156, 157).

The plaintiff at the time that the car was being driven across the tracks was sitting on the right-hand

side of the front seat, resting his eyes, when the accident happened. He was not aware of the existence of the train prior to the accident. (R. 109). The next thing he was ~~are~~ aware of was someone telling him and Lawrence to stay where they were, that an ambulance was coming. (R. 110).

The court directed the jury to return a verdict of No Cause of Action, which was done. (R. 46-A).

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN DIRECTING A VERDICT AGAINST PLAINTIFF.

On appeal from a directed verdict, this court has the duty of reviewing the evidence in a light most favorable to plaintiff. *Graham v. Johnson* (1946), 109 Utah 346, 166 P.2d 230.

Plaintiff's theory of liability was contained in Requested Instruction No. 7 submitted to the court. (R. 37). This request stated as follows:

> "If you find from a preponderance of the evidence, first, that the fireman on defendant's engine observed the automobile occupied by plaintiff as it approached and crossed the tracks leading to the track occupied by said engine; and second, that said fireman knew, or in the exercise of ordinary care should have known, that the driver of said automobile was unaware of the

approach of said engine; and third, that the said fireman failed and neglected to exercise care in taking reasonable measures to avoid collision with said automobile, then and in that event, you are instructed that said defendant was negligent; * * *"

It is plaintiff's theory that the railroad was negligent in failing to keep a proper lookout and on observing the uniform approach of the Lawrence automobile into the track in question, that the crew should have taken action, either by giving additional warning or in reducing the speed so as to be able to stop if necessary.

Inasmuch as plaintiff was not guilty of contributory negligence, in that he was seated in the car resting his eyes, the court in reaching its decision had to hold as a matter of law that there was no evidence from which the jury could find the defendant negligent, and that said negligence proximately caused damages to plaintiff. All reasonable men could not agree to this from the record in this case.

The duty of the railroad is well stated in the case of *Pippy v. Oregon Short Line R. Co.,* (1932), 79 Utah 439, 11 P.2d 305, at page 451:

> "It of course is well established that the right of the public to the use of a public crossing is mutual, coextensive, and reciprocal with that of the railway company, except that the latter, because of the momentum of trains, the confinement of their movements to the track, and the necessity and public nature of railway traffic, has the unquestioned right of way. Such prece-

dence, however, does not impose upon the traveler the whole duty of avoiding collisions. *Both parties must exercise due care and diligence with regard to their duties and are charged with the mutual duty of exercising reasonable care and diligence to prevent injury, and that the performance of such duty may, to a limited extent, be relied on by each.* * * *" (Italics ours).

The reciprocal duties of the parties are well stated in the comment following Section 480, American Law Institute Restatement of the Law of Torts, 2d, at page 536:

> Thus, if an engineer of a train approaching a level highway crossing sees a traveler approaching the track on foot or in a vehicle, he is not immediately required to take any steps either to warn the traveler by an additional blast of his whistle or to bring the train under special control, since he is entitled to assume that the traveler has discovered or will discover the oncoming train and will stop before reaching the crossing. However, it is not necessary that the circumstances be such as to convince the defendant that the plaintiff is inattentive and, therefore, in danger. *It is enough that the circumstances are such as to indicate a reasonable chance that this is the case. Even such a chance that the plaintiff will not discover his peril is enough to require the defendant to make a reasonable effort to avoid injuring him. Therefore, if there is anything in the demeanor or conduct of the plaintiff which to a reasonable man in the defendant's position would indicate that the plaintiff is inattentive and, therefore, will or may not discover the approach of the train, the engineer must take such*

steps as a reasonable man would think necessary under the circumstances. If a train is at some little distance, the blowing of a whistle would ordinarily be enough, until it is apparent that the whistle is either unheard or disregarded. The situation in which the plaintiff is observed may clearly indicate that his inattention is likely to persist, and that the blowing of the whistle will not be effective. If so, the engineer is not entitled to act upon the assumption that the plaintiff will awaken to his danger, but may be liable if he does not so reduce the speed of his train as to enable him to stop if necessary." (Italics ours).

It is submitted that this case falls squarely within the language above. The evidence shows that the fireman who presumably was keeping a sharp lookout to the front and left of the train as it approached the crossing failed to say one word until it was too late to do anything about the accident. The fireman gave the warning, "Big Hole," and the accident happened immediately, according to the testimony of the engineer. With unobstructed vision between the engine and the crossing the fireman should have seen the same thing that Raymond Jaensch saw. He could have seen the automobile coming across the seven sets of tracks slowly at a uniform speed and failing to alter his speed one iota in spite of the warnings which were being given in the customary required sequence. Yet, the fireman failed to say anything. The jury could well find this to be negligence on the part of the railroad. There was something about the situation which caused Jaensch

to pay particular attention to it. There was something about the way the car kept proceeding across the tracks that caused Jaensch to be apprehensive and certainly should have caused the fireman, who had the duty to take action.

This situation is somewhat analagous to the last clear chance situation held in the case of *Thompson v. Salt Lake Rapid Transit Co.,* (1898), 16 Utah 281, 52 P. 92. The case at bar, however, is stronger than the *Thompson* case, inasmuch as plaintiff is not guilty of contributory negligence. The *Thompson* case dealt with a deaf mute, 15-year-old boy, crossing the tracks of the defendant at an angle, with his back toward the defendant's approaching car. The operator there observed the boy, rang the bell, and then observing that the bell did not attract his attention, attempted to stop the car but failed and struck the boy, carrying him a distance of about 58 feet before stopping. The evidence was that the rear brake of the car was loose and kicked off; that the brakes in the car were not in good condition and had not been in good condition for some time. The trial court submitted the case to the jury under the doctrine of the last clear chance, and this court affirmed, stating in part:

> " * * * If the defendant knowingly placed in operation upon the public street a defective car, that could not be controlled because the appliances provided for that purpose were out of repair, and the injury complained of was occasioned by such defective brakes and appliances,

and the motorman was unable to avoid the effect of the contributory negligence of the deceased, because of such defects, then it would probably be said that the defendant's negligence was the proximate cause of the injury."

It is submitted that just as in the *Thompson* case, the fireman, as a reasonable man, should have realized that the automobile in question was proceeding across the seven sets of tracks despite the warning being given by the engineer.

It will be recalled that Lawrence stated that the proper way to cross the tracks was to proceed across all of the tracks, once ascertaining that they were clear, for the reason that a person would be in danger from traffic on other tracks if he proceeded part way across and stopped for a given track. This certainly appears to be a reasonable way of proceeding across a group of railway tracks. Reasonable men could so find.

In addition to this, reasonable men could find that the engineer stopped blowing his whistle at some distance prior to reaching the crossing from the testimony of Raymond Jaensch. Jaensch testified that the whistle stopped blowing somewhere between his position and the crossing. Reasonable men could certainly find that additional warnings would have avoided the accident. Obviously this is a jury question.

The alternative is that the fireman was keeping no lookout until the instant of the accident, which would most certainly be negligence.

As the *Pippy* case and numerous other cases have stated, the railroad has a duty to keep a reasonable lookout at crossings. It is stated at 44 Am. Jur., par. 510, RAILROADS, at page 750:

> "At ordinary crossings it is the duty of the railroad company to keep a reasonable lookout, and if the crossing is hazardous because of frequent vehicular traffic or obscured view of the travelers, the lookout must be correspondingly sharp. What would answer the requirements of a reasonable lookout depends, among other things, upon the amount and kind of travel reasonably to be expected over the crossing, and the presence or absence of safeguards such as flagmen, gates, or electric signals."

The crossing involved in this lawsuit is within the city limits and is a heavily traveled crossing, and a crossing that does not have flashing light signals, barriers, or a crossing watchman. In view of these aspects, the railroad has a duty of keeping a careful lookout; and when the fireman can observe a vehicle crossing slowly, approaching the track, a jury can find that he has a duty of doing something more than sitting inert until it is too late to avoid the accident. The protection of human life at such crossings deserves a greater duty of care than was observed in this case.

Taking Lawrence's testimony that he was traveling 10 miles per hour, he would be traveling approximately 15 feet per second, and for a distance of 160 feet from where Jaensch first saw him to the track in question. At this rate it would take him 10.7 seconds.

This means that for a period of 10.7 seconds the Lawrence car is in full view of the fireman, who cannot help but observe that he was continuing into the point of collision. Reasonable men could find that the fireman should have done something more in this situation. Taking the testimony of Jaensch, the routine series of whistles were started by the engineer approximately one block from the crossing. These whistles were being blown and heard by the fireman at the very time that the car was proceeding uniformly into the place of collision. During these same 10.7 seconds the engine, if traveling at 25 miles per hour, was traveling approximately 396 feet. Who can say that one word of caution from the fireman, with a corresponding reduction of speed by the engineer or an additional blast of the whistle by the engineer, would not have avoided the collision and crippling injuries to the plaintiff.

The spirit of the statement contained in the Restatement of Torts above demands that when any doubt exists, the train crew must act. Obviously the fireman in this case failed to live up to the spirit of this requirement. The least that could be said is that men of reasonable intelligence could differ as to the conclusion drawn from the facts in this case. This being so, defendant's negligence was a question for the jury and not for the court.

It is well established that in close or doubtful cases the law requires the case to be submitted to the jury. This is indicated by a quotation from the case

of *Newton v. Oregon Short Line R. Co.*, 43 Utah 219, 134 P. 567, 570, which was contained in the opinion in the case of *Stickle v. Union Pacific R. Co.*, 122 Utah 477, 485, 251 P.2d 867:

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

This court stated unequivocally the strong policy of the law in protecting the right of trial by jury at page 485 in the *Stickle* case:

> "Nevertheless, we remain cognizant of the vital importance of the privilege of trial by jury in our system of justice and deem it our duty to zealously protect and preserve it."

Also see *Robison v. Robison*, (1964), 16 Utah 2d 2, 394 P.2d 876, and *DeWeese v. J. C. Penney Co.*, (1956), 5 Utah 2d 116, 297 P.2d 898.

It is submitted that the case at bar is not even one of those close or doubtful cases requiring the submission of the case to the jury as specified by the above cases but is a case where the evidence clearly shows negligence on the part of the defendant. For instance, the case at bar is a much stronger case than the case

of *Morby v. Rogers,* (1953), 122 Utah 540, 252 P.2d 231, where the court submitted the question of last clear chance to the jury. The court, following Section 480 of the Restatement of Torts and *Graham v. Johnson,* supra, held that it was a jury question, relying only on the testimony of defendant himself and the physical facts. The *Morby* case involved the defendant hitting plaintiff, a boy, on a bicycle traveling the same direction. According to defendant's testimony, he was traveling 25 miles per hour when he first observed the boy on the bicycle, traveling the same direction, about 300 feet ahead of him. At about 200 feet he sounded his horn but at no time did the boy ever give any indication that he heard any warning of defendant's approach. Based on these facts, the court held that it would not be unreasonable for the jury to find that the boy was oblivious to his approach. Defendant said he first realized the danger of collision at 78 feet from the point of impact, and that he did not sound his horn until 20 feet from the boy, at which point he started to turn to his left. The court held that at the point of 78 feet the defendant could have either applied his brakes or sounded his horn, and that the jury could find that his failure to do so was negligence under the doctrine of last clear chance.

It is submitted that there is more evidence for the jury to base a finding of negligence in the case at bar than in the *Morby v. Rogers* case. In the case at bar there is clear evidence from which the jury could find that for some 10.7 seconds the car in which plaintiff

was located continued to cross slowly at a uniform rate of speed in the face of warnings given by the defendant in the routine manner. The jury could find that the fireman should have realized that Lawrence was oblivious to the approach of the train and should have so notified the engineer so that he could have slowed down the train or given additional warning. It is just as obvious that if the fireman had not been looking at all for traffic at this unwarned, dangerous crossing, the jury should find the defendant negligent on that ground.

The court relied on the case of *Gregory v. Denver & Rio Grande Western Railroad Company,* (1958), 8 Utah 2d 114, 329 P.2d 407, in directing a verdict in this case. The only similarity between the case at bar and the *Gregory* case was that both happened at the same crossing. However, there are numerous differences which make the *Gregory* case not controlling to the decision in this case. To begin with, the *Gregory* case happened in daytime. This case happened on a dark night. In the *Gregory* case, the only evidence offered as to failure to keep a proper lookout was the mere happening of the accident itself, and the train in the *Gregory* case was a much larger train and was traveling at a greater speed. It is obvious that the engine and two cars involved in this case could be controlled more easily than the large train at the greater speed involved in the *Gregory* case. In this case we have evidence that the car involved could be seen crossing slowly and uniformly a distance of 160 feet over a time period of