In the Court of Common Pleas

No. 2, of Allegheny County, Pa.

Stoltenberg)
)
vs.)
)
P.& L.E.R.R.Co.)

Oral Charge of the Court.

Gentlemen of the Jury:

This action is brought by the plaintiff to recover damages from the defendant company for an injury he received in July, 1892. It seems that he was on the top of a passenger car, in the yard, at the South Side, and in passing under a wire, the wire broke, struck him on the head, threw him over, and in the fall he broke his collar bone. He alleges that this injury was from the negligence of the defendant company, and he seeks to recover damages. In actions of this kind two things are necessary for a plaintiff's recovery. One is to prove that the injury resulted from the negligence of the defendant company. Railroad Companies are not insurers of the lives of their employes and workmen, and there are certain hazards that all employes and workmen are subject to, for which the Company is not responsible. There must

be negligence on the part of the defendant company, and negligence that caused the injury.

A second point is that even if there was negligence on the part of the defendant company, and however gross that negligence may have been, the plaintiff cannot recover if he was guilty of negligence that contributed in any degree to the injury. Juries cannot say that both parties were guilty of negligence, but that the defendant was guilty of far greater negligence than the plaintiff, and, therefore, give a verdict against the defendant. Juries cannot apportion the injury according to the degree of negligence, and the principle of law is well established that where the plaintiff has been guilty of any degree of negligence which contributed to the injury, he cannot recover at all. Now what is negligence? Negligence, giving a brief definition of it, is carelessness; the want of care and prudence. In other words, negligence is doing something that ought not to have been done under the circumstances.

The first question then is, was the defendant company guilty of some negligence, doing something that ought not to have been done, or neglecting to do something which ought to have been done? And then as to the plaintiff, was he guilty of negligence, that is, did he do something which an ordinarily prudent careful man would not have

done under the circumstances, or did he neglect to do what an ordinarily careful man would have done under the circumstances?

Now it seems from the evidence that the plaintiff was a tinner, and was working for the defendant company; had been for some time under the Foreman, or one that had charge of the repairs in the tinning line of the cars of the defendant company. He went there on the morning of the 29th of July of last year to do some repairs to the top of a passenger car; went there in the morning probably between seven and eight o'clock; was told that the car was on a side track, and that it would remain until nearly 12 o'clock, when he would have ample time to do the work that was necessary to be done on the top of it-- it was repairing the smoke stack, I believe, and, as he says, doing something in reference to the little smoke stacks above the lamps that hung in the car. He got up on top of the car and began to work, when he found the car moving; according to the evidence, the engineer having charge of the moving of cars in the yard was directed to take that car out and place it in position for the train that was to be taken out. When the car started to move out from its position it passed under a wire that was intended as a guy support to a post at one side of the railroad tracks, extending across some of the tracks and the sidings, and fastened to

a telegraph post; if I understand the testimony correctly, at the side, near the post that was thus guyed, or braced by this wire, is where the track was that the car passed under. At that point, according to the evidence, the wire was about 19 feet and 1 inch, I believe, above the track. The passenger car was 14 feet and 4 inches up to the top of what is called the hurricane deck. The passenger car has a center elevation in the middle of the car, the roof of that portion being raised over the two sides of the car, and, according to the evidence of some of the witnesses that was about 18 inches higher than the sides-- than the other portions of the roof, because the ventilators are on the side of what is called the hurricane deck. The distance from the top of that hurricane deck to the track was 14 feet and 4 inches. That would leave about five feet, perhaps not quite five feet, from the top of the hurricane deck to the wire, and, of course, from the other portions of the roof of the car it would be just as much more as that hurricane deck was above the other portions, something like a foot and a half. The plaintiff said that his height was 5 feet 6 1/2 inches, and that would corroborate those measurements, because he says the wire struck him about the head here-- probably about six or eight inches from the top of his head. It is veru evident, therefore, that if he had been standing on the lower portion of the

roof of that car the wire would have been above his head, because there would have been over six feet of space between the lower portion of the roof of the car and the wire. Or, if he had been sitting on the hurricane deck, he would not have been struck by the wire. Those facts, I believe, are not in controversy in the evidence. Now the first question is, of what negligence was the defendant company guilty? The defendants' Counsel has presented a point to me that under all the evidence the plaintiff cannot recover. I have declined to affirm that point, because I wish the jury to pass upon the questions of fact that I submit to you.

It has been suggested that he was injured through the negligence of a co-employe of the defendant company. I do not think that the injury resulted from any negligence of a co-employe. That would be the engineer, or some of those workmen, or servants, who directed the car to be moved. I do not think the injury resulted directly from the moving of the car. It is not likely that any of the employes of the company knew that the plaintiff was on the top of this car at that time. They so testify-- those who have testified here. The engineer did not see him; did not know he was on it when he hitched to the car to move it. The plaintiff says he did not see the engineer until after the car got in motion. It is not likely, I say,

that those who directed the engineer to go in and move that car had any knowledge that the plaintiff was on top of the car, and the plaintiff had no reason to anticipate that the car would be moved while he was there. He was told the car had been placed on that track for the purpose of being repaired, and would remain there long enough for him to have it repaired. Now if the engineer had backed that car in violently, and had struck the car on which the plaintiff was, and by a sudden jar caused him to fall off, that I apprehend would have been the negligence of a co-employe, because all those men are considered as engaged in one common business, and where a person is injured by the negligence of a co-employe the Company is not responsible. Or, if the engineer in moving the train out had done it in such a negligent way as to injure the plaintiff, the negligence of a co-employe there would have prevented the plaintiff's recovery. But the injury resulted from a wire that was stretched across the track, and the plaintiff says he did not know of it, and did not see it at the time. The case is one not free from doubt. I regard the case in several respects as rather a close case, yet I wish the jury to pass upon the facts. The only negligence, therefore, would be whether this wire was of a character that would reasonably require the Company to place it higher. That depends now largely upon the kind of business that

would be transacted where the wire was. It was, according to the testimony, about five feet higher than the top of the hurricane deck of the passenger car, and about the same distance above the deck, or roof of the highest and largest freight car. The principle that I lay down to you in the case as to the negligence of the defendant company is this: If it could be reasonably anticipated by the defendant company that at some time a passenger car might pass under the wire while an employe of the Company might be on the top, or a mechanic be making repairs on the roof, it would then be the duty of the Company to place the wire high enough to avoid striking such a person, and a failure to place it that high would be a neglect of duty, which would be negligence. If you find that there was negligence of the Railroad Company as to that wire, under this instruction, then you pass to the second question, was there contributory negligence on the part of the plaintiff? That depends now upon the facts as given in evidence, and I give you this principle as governing it: If the plaintiff, after the car began to move, did not look forward to see where the car was going, or see if there was any danger in standing up, or if in any other respect he did not observe that care and prudence to avoid injury which an ordinarily careful man would have exercised, then he was guilty of contributory negligence, and cannot re-

cover, no matter how negligent the defendant company may have been. Now you will take the testimony bearing on that. He was standing on the car-- on the highest portion of the roof-- the hurricane deck. He said he was walking forward, as I understand his testimony, and he was looking to one side. He said there was some smoke coming out from the locomotive. Now it is for you to say whether it was carelessness, negligence, imprudence on his part in standing up right on the top of that upper deck, and not being careful to see where he was going, and to see whether there was any danger. If you find these two points in favor of the plaintiff, that there was negligence on the part of the defendant company, and no contributory negligence on his part, then you pass to the question of damages. The plaintiff has been at no expense for doctor's bills or for nursing, according to the evidence. He has been thrown out of employment, according to his testimony, and he has suffered pain. If he is entitled to recover, he is entitled to recover for the pain and suffering that he has endured, and that is a matter that has to rest in the sound discretion and judgment of the jury. If he had incurred any expense for doctor's bills, or for nursing, that would be another element. If he has been permanently injured, disabling him from making a livelihood, or following his regular vocation, that would be another element.

The loss of time from the time of the accident until this time, if he has been disabled up to this time, would be also an element in estimating his damages. He said he was making $2.35 a day before the accident. There is here, however, a question raised by the evidence as to whether he is permanently disabled by that accident; and whether also he has not, by his own conduct and imprudence, aggrevated the injury and prolonged the suffering, or the disability. It seems that he was sent by the Railway Company to the hospital just after the accident occurred, and his shoulder was dressed there by the resident surgeon of the hospital. Although he may have been a young man, yet, according to the testimony of all the physicians here, Dr. Le Moyne, McCord, and the others, what the resident physician did there was right; he put the bandages on in a proper position-- first those adhesive plasters, and afterwards the muslin bandages. It seems from the testimony that the plaintiff took off these muslin bandages at the hospital just after they were put on, or shortly after. In the evening, the surgeon there again dressed him. He admits this himself. Then after he was taken home, and taken home by one of the employes of the defendant company, Dr. Barr, one of the surgeons of the defendant company, called to see him at his residence; he called to see him several times there, and after the plaintiff got to going

about, he came to Dr. Barr's office and saw the Doctor there. Dr. Barr testifies that when he first went out to see him, which was the day after he was sent from the hospital, the bandages were cut, that is these muslin bandages, and he replaced them, and when he went back again they were again removed, or slipped down, and he testifies that he was not obedient to his directions in reference to keeping the hand in the proper position. He says that at one of these visits he found the hand which was placed up to his breast, as the doctors all said it should be, loose. Now it will not do to say that the defendant company sent these physicians out there simply to make a case for the Railroad Company. The Railroad Company acted very prudently, humanely and properly in having their surgeons go and see a man that was injured in their employ; it saves that man from the expense of a physician, and the duty of the physicians is to do what that patient requires, or needs. Presumably, the surgeon, or physician, acts in good faith, as he is bound to do, and does what he believes to be the best for the patient. If he is not satisfied with the physician that the defendant company sends, he can call in any person else he pleases; he is not bound to have that physician or submit to him. But I do not understand from all the witnesses that there was anything like wrong treatment on the part of any of the physicians. Dr.

Le Moyne, and I believe all of them, testified that the bandages that were put on were the proper treatment for the breaking of the collar bone. Dr. Le Moyne thinks that there was not a proper adjustment of the bones; that in place of the two bones coming together directly opposite to each other they slipped by each other a little. Dr. Le Moyne never saw him until a short time ago, and by feeling them he discovered that. Dr. McCord, one of the surgeons of the defendant company, saw him in August of last year, within three or four weeks after the accident, and after he had been at the hospital, and after the treatment of Dr. Barr. The plaintiff called to see Dr. McCord. Dr. McCord examined him then and said he was all right; he was doing right, and just to be patient; that it would all come right in the end. That, to my mind, gentlemen, is very strong evidence that there was no mal practice or bad treatment by Dr. Barr. If Dr. Barr is a reputable physician and surgeon, and was sent out there by the Railroad Company, and he was guilty of mal practice, the Railroad Company would not be responsible for it; he would be responsible directly for the mal practice. The testimony of Dr. McCord, Dr. Barr and Dr. Milligan, as I understand it, is all to the effect that this knitting of the bone is all right; that there is no displacement of the bones. The testimony is for you. If your idea of the testimony dif-

fers from mine, take your own idea of what the testimony is, but I understood them all to agree that there was nothing wrong in the adjustment of the bones. They testified, or at least Dr. Barr and Dr. Milligan, that the measurements showed that there was no slipping past of the bone. Dr. McCord explained that there was a little ring-around, and that that was customary in fractures of that kind, but he thought it would pass away; it would be absorbed in the end, and he explained that he might suffer pain because that protuberance interfered with some of the nerves at that point, but that in the course of time the protuberance would be absorbed, and by the exercise of the limb it would recover. Dr. Milligan says that if the limb would be exercised more it would return to its normal condition. He explained that where there was an injury of that kind, a fracture of the bone and a portion of the body, it would need rest, and has to remain in rest, and in an immovable position for some weeks, say six, or eight or ten weeks. The muscles naturally contract, and when the healing and knitting of the bone takes place, in exercising the arm those muscles that have been rather contracted by the immovable position will have some pain, but by exercise it will pass away. If the plaintiff has by his own neglect, in the first place by not carrying out the instruction of the surgeon, or if since by not proper[illegible]xercising, has

aggravated his case, the Railroad Company should not be responsible for his negligence, and disobedience to the physicians' orders. If you find that he was injured by the negligence of the Railroad Company, and not by any contributory negligence on his part, then he would be entitled to recover damages. Those damages would cover the time from the injury on down to when he ought to have been restored to health, so as to go as usual to work. If that could have been done in a month, or six weeks, or eight or ten weeks, that would be the limit, but if from that time it has been a source of suffering to him, or disability in consequence of his own neglect to observe the directions of the physician, or otherwise, then he ought not to recover for the time that he has been disabled by his own neglect. If he was not guilty of any neglect or imprudence which has prolonged his sufferings, and the Company is liable, then they would be liable on down to this time, and for the future, so far as the jury can ascertain how long that disability may continue. It may not be a total disability. A man even with one hand can work, and certainly is able to do something. These are matters that must be considered by the jury in this case.

Oct 3-94 This charge ordered to be filed

J. W. S. White