1954

Doyle Lawrence v. Bamberger Railroad Co. : Brief of Appellant

Utah Supreme Court

Forrest W. Fuller; Attorney for Appellant;

IN THE SUPREME COURT

OF THE STATE OF UTAH

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DOYLE LAWRENCE, an infant, by JESSE LAWRENCE, his Guardian Ad Litem,

Plaintiff and Appellant,

-vs-

BAMBERGER RAILROAD COMPANY, a corporation,

Defendant and Respondent.

APPELLANT'S BRIEF

Case No. 8244

- - -oOo- - -

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STATEMENT OF FACTS

On March 9, 1951, plaintiff, an infant under the age of 21 years, was struck by the locomotive of a train operated by the defendant, resulting in severe injuries to the plaintiff, not the least of which was the amputation of plaintiff's lower right leg. Prior to and at the time of the accident, plaintiff was afflicted with a physical disability known as muscular dystrophy, which

affected his gait while walking so that he lifted his right leg higher than is normal and was also afflicted with a schizophrenia which manifested itself by vivid delusions and hallucinations.

The accident occurred at the intersection of Eighth North and Third West Streets in Salt Lake City, Utah. At this point defendant has two sets of tracks running North and South, and the same are intersected at right angles by a 50- to 60-foot wide paved public street known as Eighth North Street. At the time of the accident, defendant was operating a train consisting of an electric locomotive, seven loaded freight cars, and an empty freight car, which, at a low rate of speed and under its own power, was proceeding along the most westerly set of tracks in a southerly direction.

When first sighted by defendant's train crew, plaintiff was standing on the east side of the easterly set of defendant's tracks; and the front of defendant's locomotive was 150

yards from the plaintiff. The train crew made a slight initial application of air through the brake line of the train. The plaintiff walked across both sets of tracks in front of the oncoming train, reached a position just to the west of the most westerly set of defendant's tracks; and when the front of the locomotive was 100 yards from the boy, in response to an insane delusion that he heard an irresistible voice directing him to step upon the tracks, the boy, in full view of the train crew, stopped, turned, stepped back upon the tracks, and stood facing the oncoming train, shifting or dancing from one foot to the other, making no move to leave the tracks. While the front of the train was still 100 yards from plaintiff, and upon his stepping upon the tracks, the train crew sounded the train's warning whistles and bells; and defendant's engineer shouted and waved his arms at the boy. In this manner the train approached to within fifty yards of the boy before the crew members

applied braking measures to the train; and at that point (50 yards from the boy), full air pressure was applied to the braking system.

The front of the locomotive struck the plaintiff and came to rest 16.5 to 20 yards beyond the point of impact, pinning the plaintiff underneath the drivers of the locomotive.

The case was tried by the Court sitting without a jury; and upon the conclusion of the appellant's evidence, the respondent moved for dismissal. The Court thereupon ruled in favor of the movant and entered a judgment dismissing the cause with prejudice. Plaintiff moved for a new trial, which motion was denied by the Court. From these orders plaintiff appeals.

STATEMENT OF POINTS

I

THERE WAS SUFFICIENT EVIDENCE ADMITTED BY THE COURT TO ESTABLISH NEGLIGENCE ON THE PART OF BAMBERGER RAILROAD COMPANY, WHICH NEGLIGENCE WAS THE PROXIMATE CAUSE OF THE INJURY TO DOYLE LAWRENCE; AND THE COURT ERRED IN GRANTING A NONSUIT.

II

THE COURT ERRED IN EXCLUDING CERTAIN TESTIMONY OFFERED BY THE PLAINTIFF

ARGUMENT

I

THERE WAS SUFFICIENT EVIDENCE ADMITTED BY THE COURT TO ESTABLISH NEGLIGENCE ON THE PART OF RAMSEYER RAILROAD COMPANY, WHICH NEGLIGENCE WAS THE PROXIMATE CAUSE OF THE INJURY TO DOYLE LAWRENCE; AND THE COURT ERRED IN GRANTING A NONSUIT.

It is a well-known rule of law that, when the trial court has granted a motion for nonsuit in favor of a defendant, the Supreme Court, and also the trial court in the first instance, must take all the evidence against the defendant as true and give the plaintiff the benefit of every favorable inference and intendment which fairly arises from such evidence. Caldrowicz v. Ward, et al...U....; 230 Pac 576; Kitchen vs. Kitchen, 83 U. 370, 28 P 2d 180; Gypsebeak v. Lakeside Printing Co. 55 U. 335, 186 P. 103; Maberto v. Wolfe,

106 Cal. App. 502, 289 P. 818.

The warning bell and whistle of the train were not sounded until it was 100 yards from the crossing. (Tr. 57 & 59)

Section 56-1-14, U. C. A. 1953 reads:

> "Every locomotive shall be provided with a bell which shall be rung continuously from a point not less than 80 rods (440 yards) from any city... street or public...crossing...
>
> "Every person in charge of a locomotive violating the provisions of this section is guilty of a misdemeanor, and the railroad company shall be liable for all damages which any person may sustain by reason of such violation."

A failure on the part of the railroad to ring the bell or sound the whistle as required by this section is negligence per se, and a party injured by such negligence is entitled to recover unless he himself is guilty of contributory negligence. Bitner v. Utah Cent. Railroad Co., 4 U. 502, 11 P. 620; Olsen v. Oregon Short Line et al, 9 U. 129, 33 P. 623; Judd v. Oregon Short Line R. Co., 4 F. Supp. 657; Wilkinson v. Oregon Short Line R. Co., 35 U. 110, 99 P. at 469; Smith v. Rio Grande Western R. Co., 9 U. 141,

33 P. 636; 74 CORPUS JURIS SECUNDUM 1389, Sec. 743 "Railroads."

The rights of travelers and railroad trains at crossings are mutual, coextensive, and reciprocal; that is, both must use reasonable and ordinary care to avoid accidents. Pingy v. Oregon Short Line R. Co., 79 U. 439, 11 P. 2d 305; Crosscamp v. San Pedro L. A. & S. L. R. Co. U. , 109 P. 10; Cottam v. Oregon Short Line R. Co., 55 U. 330, 187 P. 827; 3 ELLIOT ON RAILROADS (3d Ed.) 489, Sec. 1646; 74 CORPUS JURIS SECUNDUM 1312, Sec. 716 "Railroads."

The general rule of law covering the instant case is often and consistently stated as follows:

An engineer may presume that a person on or near the tracks at a crossing is in possession of his natural faculties, aware of the situation, will exercise care for his own safety, and will remove or remain in a place of safety; and he need not stop nor check the train until he knows or should know that the person apparently will not get, or stay out of danger, or until the situation otherwise discloses itself to a reasonable man on guard. Although the

cases read by counsel citing examples of times and circumstances in which the right to indulge the presumption was upheld greatly outnumber those in which the crossing party's actions or position were held to put the engineer on notice, rarely, if ever, did the Courts' opinions fail to state the rule in just this conditional manner; and in most such cases recovery was barred by contributory negligence on the part of the crossing party. 3 ELLIOT ON RAILROADS (3d Ed.) 492, Sec. 1606; 74 CORPUS JURIS SECUNDUM 1400, Sec. 751; Ross v. Fleming, 165 K. 491, 194 P. 2d 491; Hope v. Northern Pac. R. Co., 147 P. 2d 950; Land v. Pacific R. Co, 145 P. 2d 916; Hammarsen v. Fresno Traction Co., 59 P. 2d 617; Chouette v. Key System Transit Co., 5 P. 2d 921; Cate v. Fresno Traction Co., 2 P. 2d 364; Pigg v. Oregon Short Line R. Co., U. , 11 P. 2d 305.

In none of the cases read by counsel did the facts so strongly demand a responsive action from the train crew as do they in the instant case. In no case was it so apparent that the person near the track would not turn or step

out or danger. By the testimony of one of the crew members of defendant's train, the crew watched the plaintiff cross the tracks in front of the train, through a position of peril to a position of apparent safety, then turn and step back on the tracks, where, even though the train was coming perilously close, where even though the bell and whistle of the train were being sounded, where even though the engineer was shouting and waving his arms, the boy remained facing the train, obviously capable of seeing, yet making no move to leave the tracks, and shuffling his feet alternately up and down in a pathetic dance. (Tr. p. 55, 56, 57, 66, 67) The boy walked with a noticeably higher lift to one foot than normal and lifted this foot noticeably higher than the other. (Tr. 50-51) The facts and the exercise of ordinary care demanded responsive action; and the action demanded was to use every possible means to bring the train to a halt, including a full application of air to the braking system, if not when the boy was first observed crossing the tracks in front of the train, certainly when he

stepped back on the tracks, in a position of impending peril and stood facing the train.

Since the train was completely stopped in 66.5 to 70 yards, once full air was applied, it is manifest that, had full air been applied when the train was 100, 90, 80, or even 70 yards from the boy, the accident would not have happened.

That the crew was actually, if not admittedly aware of the boy's peril, is evidenced by the fact that the motorman waved his arms at the boy and shouted at him, and by the fact that, upon sighting the boy, some initial air was applied; both acts completely ridiculous endeavors if the crew actually thought that the boy would get off the tracks and out of danger.

In Gate v. Fresno Traction Co., Cal. , 2 P. 2d 364, it was held that as to a guest in a car struck by a train to whom negligence could not be imputed, the duty to use ordinary care existed; and the engineer, once the facts indicated a possible collision was bound to do everything to stop the train short of

impact. In this case the Court placed great emphasis upon the fact that the motorman, even though he testified that the driver of the car with which the train collided was looking right at the motorman and must have seen the train the motorman at one point "went over and got a little air" though not enough to avoid the accident, and used this fact to support the proposition that the motorman was not actually indulging a presumption that the driver of the auto would remain in a position of safety and that it was the duty of the motorman to use ordinary care to avoid collision, which care demanded that he use all available measures to slow or stop the train before impact. The Court held that he did not exercise ordinary care, and the auto passenger recovered damages. The California Court quoted the following language in Stein v. United Railroads, 159 Cal. 368, 113 P. 663:

> "The evidence thus being sufficient to show that the motorman had reason to believe that the plaintiff was likely to be injured, the law imposed upon him the duty of exercising at least ordinary care to avoid the injury. It

is clear that within the contemplation of ordinary care and prudence and in consonance with a just regard for the safety and welfare of others, the act required of him was to endeavor to stop his (railway) car before a collision occurred. At least, the case was such as to make it a proper question to be determined by the jury whether he acted promptly in his effort to stop the car when he was apprised of plaintiff's danger. If he made an honest effort to do so, no one, of course, could contend that he was at fault. But, on the other hand, if he failed to use the means at hand and made no effort to prevent the accident until he saw that it was impossible to avert it, the jury would be justified in finding for the plaintiff."

In Chevette v. Bay System Transit Co., Cal. , 5 P. 2d 921, at page 926, the Court adopts the position that an engineer has a right to presume that a person near the tracks will use care to avoid injury by an approaching train; but, that when the person steps upon the tracks, the right to indulge the presumption is terminated; and the engineer must use all available means to stop the train before impact. Here the train was only 40 feet from the pedestrian when the pedestrian stepped upon the tracks and the train couldn't be stopped in time in any event. Such is not the case in the [illegible] herein because

here the defendant's locomotive traversed thirty to thirty-three and one-half yards of track, during which time, if full air pressure had been applied, the train could have been stopped short of impact. Rather than apply full air pressure, the crew adopted such ineffectual measures as shouting, waving their arms, and ringing bells.

In Green vs. Los Angeles Terminal R. Co., 143 Cal. 31, 76 P. 719; on rehearing, at page 720, the Court in citing with approval Glenn v. Northern Pacific R. R., 84 Minn. 253, 87 N. W. 843, which advances the theory that an engineer may indulge in the presumption that a person approaching the railroad tracks will use care to avoid injury and remain in a position of safety only until that person steps upon the tracks; and that immediately upon such action, the engineer must use all available means to stop the train to avoid collision, says:

> "...that she was only placed in such peril at the moment when she stepped from her point of safety upon the pathway to the tracks; and that, from the instant she placed herself

> in that situation of peril, the defendant's employees did all in their power to avert the accident, but without avail. ('blew the whistle, applied the air brakes, and reversed the engine'). This was all the law required...

It is interesting to note that on the first hearing of this case, the California Supreme Court ruled 4-3 in favor of the plaintiff, but that on rehearing, the Court ruled 5-2 in favor of defendant; but on the ground that when peril became obvious; viz., only when plaintiff stepped upon the track, the train was too close to stop. Also see 44 AMERICAN JURISPRUDENCE 707, Sec. 471.

In Lee v. Market St. R. Co., 67, P. 765; where there was evidence in the record to the effect that a passenger had called to the attention of the motorman that the plaintiff had stepped upon the tracks in time to avoid collision, and the motorman merely shouted instead of applying braking measures, it was held that the jury properly rendered its verdict in favor of the plaintiff.

Another line of cases recognizes a limitation to the general rule either than the

rule or qualifications. This limitation is set forth in 44 AMERICAN JURISPRUDENCE 749, Sec. 509, wherein it is stated:

> "Due care generally does not require the engineer to stop the train, but he may act on the supposition that the traveler will stop before reaching the track. If, however, the traveler continues his course, the engineer must not rest upon this supposition so long as to allow his engine to reach the point where it will become impossible for him to control his train...in time to prevent injury to the traveler."

This duty on the engineer not to indulge in the presumption that the traveler will protect himself has even been extended to trespassers. 44 AMERICAN JURISPRUDENCE 706. In Hoddies v. Chicago N. W. R. Co., 46 N. W. 117, the Supreme Court of Wisconsin approved the following instruction to the jury in a crossing accident case.

> "The mere fact that the traveler is approaching the track is not of itself along sufficient to require the engineer to give an alarm or stop his engine, especially where it is in broad daylight, the engine plainly visible, the engine bell ringing, the traveler is an adult in apparent possession of his senses and looking in the direction of the train. In

such a case the engineer would have the right to assume that the traveler would stop, but he cannot rest on such an assumption so long as to allow his engine to reach a point where it will become impossible for him to control his train or give warning in time to prevent injury to the traveler, supposing the traveler to continue in his course."

Ineas v. Union Pac. Ry., 241 P 2d at 1185, Idaho; No duty on train operators to retard speed until there is something to indicate that traveler approaching the crossing is not going to stop before reaching a point of danger. (Here contributory negligence prevented recovery)

Surely it cannot be denied that a reasonable man charged with the duty of ordinary care would have applied full emergency stop measures at the time the plaintiff stepped upon the tracks. The facts which existed at the time the train crew actually applied full air-pressure were identical with the facts which existed the moment plaintiff stepped upon the tracks. In other words, the situation which actually moved the crew to action was the same identical situation which would

have prompted a reasonable man exercising only ordinary care to apply full air pressure ten, twenty, or thirty yards earlier in the course of the train's progress toward the plaintiff, thus avoiding impact. This omission to act when the plaintiff was in a position of known peril makes the defendant negligent, if not guilty, of wanton, wilful, and reckless disregard for the plaintiff's life and well being.

II

THE COURT ERRED IN EXCLUDING CERTAIN TESTIMONY OFFERED BY THE PLAINTIFF.

At one point in the trial of this case, plaintiff first having qualified the witness as an expert, sought to introduce evidence to the effect that the train's braking ability was unreasonably taxed, due to the overnormal weight load of the train. The Court excluded this testimony on the basis of the pretrial order. (Tr. 52,53). One contention of the pretrial order on behalf of plaintiff was, "that the engineer in charge...saw the plaintiff in ample time to have stopped the train, but that

he negligently failed to bring the train to a stop..." (Record p. 13) One issue of fact of the pretrial order read, "Was the defendant...negligent in driving...the train ...against the plaintiff" (Record p. 14)

It is surely manifest from the use of the word "negligence" in this way that the contentions and issues were broad enough to allow in evidence testimony which could have tended to prove negligence on the part of defendant due to an overloaded train.

CONCLUSION

The trial court committed reversible error in granting defendants motion for a nonsuit, in dismissing plaintiff's cause of action, in its refusal to grant a new trial, and in excluding plaintiff's testimony offering to show that the braking system of the train was overloaded. The judgment of trial court should be reversed, and the cause should be remanded. Plaintiff-Appellant should be awarded the costs of this appeal.

Respectfully submitted,

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