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Arthur W. Cross, Law Printer, 243 Market Street, Newark, N. J.

New Jersey Court of Errors and Appeals

HYMAN KARNITSKY,
Plaintiff-Appellant,

vs.

MORRIS MACHANIC and SIDNEY PROSS,
Defendants-Respondents.

Action at Law.

On Appeal from the Essex County Circuit Court.

BRIEF OF BENJAMIN M. WEINBERG FOR PLAINTIFF-APPELLANT.

This is an appeal from a judgment rendered in the Essex County Circuit Court, in favor of the defendants.

Sufficient of the facts in this case to raise the assignments of error, herein argued, are found in the charge of the Court, on pages 10 to 22 inclusive. From them it will appear that the plaintiff boarded a jitney bus operated by the defendants, at or near the corner of Elizabeth and Hawthorne avenues, in Newark, about one-thirty o'clock in the morning. When the bus reached the corner of Broad and Green streets, near the City Hall on Broad street, he met with injuries sustained by his falling, or being thrown from the bus in which he had been riding, as a passenger. His story was, that when he boarded the jitney bus, it was crowded so that he was obliged to stand on what is called a step, although not strictly such, at or near the doorway. He says that when the bus reached the City Hall, he was obliged to alight therefrom, in order to permit other passengers to leave, and that as he was about to get back, and while he was partly on the bus, it was started with a sudden jerk and he was thrown and dragged along the street and thus injured (pp. 13 & 14, etc.).

The defendants' story was to the effect that the plaintiff had been standing in the doorway on the so-called step, but was ordered by the driver on several occasions to get into the car, the defendants' contention being that there was room inside of it. The defendants do not tell how the accident happened, any further than to say that, as the bus was coming to a stop near the City Hall, the plaintiff suddenly fell from the step, without there having been any lurch or other violent movement of the bus (p. 15, etc.).

ASSIGNMENTS OF ERROR.

The errors assigned are found on pages 2 and 3, and are based solely upon erroneous statements of the Court in its charge to the jury, and upon its refusal to charge certain requests.

POINT ONE.

The Court was requested to charge the following proposition of law:

> "It was not negligence *per se*, for the plaintiff to ride upon the step of the bus, if you believe he did so, if he was there with the express or implied consent of the defendant" (page 23).

What the Court said on that subject was as follows:

> "It was not negligence *per se,* negligence in itself, to ride on the step of a jitney bus, if it were crowded" (page 18).

It is submitted that the Court charged the law too narrowly, by limiting the right of the plaintiff to ride, without being charged with negligence, on the step, *provided the bus was crowded;* in other words, that it was *negligence per se to ride on the step of the bus,* if it was not crowded. The opinion of Justice Trenchard, in the case of *Trussell* v. *Morris County Tr. Co.,* 79 N. J. L. 533 (536) is quoted from, as sustaining that proposition, but it is respectfully submitted that that decision does not lay down the rule that it is negligence *per se* to ride upon the step of a car *when there is room for one inside of it,* but it is authority for the proposition that when one rides upon the step of a car, when there is room inside, he takes upon himself the risk of injury from perils *attendant upon his position,* "such as the danger of being thrown from the step by the ordinary jolting and swinging of the car."

In the case of *Donahue* v. *Pub. Ser. Ry. Co.,* 79 N. J. L. 537, decided about the same time that the Trussell case was, Justice Parker in the opinion written for this court, in which he cites the Trussell case, said "some suggestion is made that he was guilty of such negligence by standing on the running board, but this is denied in fact; and if it were true, it would not be negligence *per se,* or an assumption of any risk not incidental to that position in the ordinary and proper operation of the car" (p. 541).

See also *Whalen* v. *Con. Tr. Co.,* 61 N. J. L. 606.

POINT TWO.

The second request to charge on behalf of the plaintiff was as follows:

> "The defendants having undertaken to carry for hire, all persons who applied for passage, are common carriers of passengers and as such, they owe to their passengers a high degree of care for their safety" (page 23).

What the Court did say on the subject was as follows:

> "Now, gentlemen, from all this testimony, it will be for you to say whether or not the fall of the plaintiff was caused by the negligent operation of that car by Brown, the chauffeur, whether or not he operated his automobile, as a reasonably careful and prudent person would operate it, whether or not in view of the high degree of care which is owing by a carrier of passengers to the passengers, he did what an ordinarily careful and prudent man would have done" (p. 17).

The defendants having undertaken to carry passengers for hire, owed to such passengers, a high degree of care for their safety. *Schott* v. *Weiss,* 105 Atl. 192. The charge, as given, is very confusing. In one breath, it suggests that the driver of the automobile was under a duty to operate the bus "as a reasonably careful and prudent person would," while at the same time, it informs the jury that a carrier of passengers is under the duty of using a high degree of care. To the lay mind, it must appear, from the charge, that two different duties are imposed in a case of this sort, to wit: the duty of using reasonable care on the part of the driver, and the duty of using *a high degree* of care on the part of the owner or carrier. The request to charge followed the language in the case of *Schott* v. *Weiss, supra,* and the plaintiff was entitled to the instruction as requested.

In the case of *Ruckman* v. *Bergholz,* 37 N. J. L. 437, this Court held that "it should be clear that a mis-direction in a charge has done no injury to the party complaining of it, and if there is reasonable doubt on that head, he is entitled to the benefit of it" (syllabus 5).

See also *Aldrich* v. *Peckham,* 74 L. 711.

In the case of *McNear* v. *Amer. & Brit. Manfg. Co.,* 107 Atl., p. 242 (Sup. Ct. R. I.), the Trial Court in its instructions to the jury in an accident case, told the jury in one part of its

charge that the driver of the automobile was under the duty to exercise a high degree of care in the management of it; in another portion of its charge it instructed the jury properly, namely, the duty of using reasonable care. The reviewing Court held that these conflicting and confusing instructions constituted error, and said, "This is in accordance with the established doctrine that when contradictory instructions are calculated to confuse and mislead the jury, they constitute reversible error. It cannot be left to the jury to reconcile the conflicting statements of law; and it is impossible for the Appellate Court to determine in accordance with which of two inconsistent statements, their verdict has been reached."

It clearly appearing that the charge of the Court complained of is inconsistent and confusing, and it not appearing that no injustice or injury was done the plaintiff, it is submitted most respectfully that the verdict should be set aside for this reason alone.

POINT THREE.

The third and fourth assignments of error are hereby abandoned, but the fifth one is most strongly urged as a ground for reversal.

The learned Court undertook, in its somewhat lengthy charge, to inform the jury as to the facts of the case. Extracts of such testimony are found right through the charge commencing on page 11. Conclusions are stated and aside from one sentence, all the testimony is stated in the third person. At the conclusion of the charge plaintiff's counsel duly excepted to the statement of the Court found at the top of page 17 as follows: "Now, gentlemen, from all this testimony, it will be for you to say whether or not the fall of the plaintiff was caused by the negligent operation of that car by Brown, the chauffeur, etc."

The exception on page 22 apprised the Court that the reason for its taking was that the Court, after having read from its notes, made the statement in question—the point being that the jury had the right to consider *all the other evidence in the case.*

While the printed book fails to set forth any of the evidence, in *haec verba,* it will undoubtedly be assumed by this Court, that the testimony was given in the first person by the various witnesses, and also that testimony other than that mentioned by the Trial Court was given. Direct and cross examination are

stated as one by the Trial Court and many circumstances and necessary evidence is apparently omitted in the charge. The Court, at the time the exception was prayed, did not inform counsel, so far as the record shows, that there was no other testimony in the case.

In *Fitzimmons* v. *Commerce Trust Co.*, 200 S. W. 437 (Mo. App.), it was held error to direct attention of the jury to the testimony of one witness, while the testimony of other witnesses on the same subject was omitted; it being held that the jury had a right to be informed that it should consider all of the *evidence on the subject.* In *Wallace* v. *Norfolk Southern Ry. Co.*, 93 S. E. 73 (N. C.), instructions singling out testimony of one witness and directing jury's attention thereto, instead of to all the evidence bearing on the issue, was said to be objectionable.

See also *Rynearssen* v. *McCartney*, 203 Ill. App. 555.

In *Southern Traction Co.* v. *Gee*, 198 S. W. 992 (Tex. Civ. App.), it was held improper for the Court to select certain portions of the testimony, giving undue prominence to the same; and in *Kent* v. *Ogden L. & I. Ry. Co.*, 167 Pac. 666 (Utah), it was said that the Court should not name the specific things or acts which the jury may consider in determining contributory negligence, but should instruct them to determine the question from a consideration of the whole evidence.

In our own State, it was pointed out, in the recent case of *The State* v. *Herbert, et al.*, 105 Atl. 796, that mis-statements of fact by the Court cannot be cured by telling the jury that it is to rely upon its own recollection because of the fact, that statements made by the Court "with material before him to refresh his memory, carried with it great force and conviction and would naturally impress the minds of the jury of the existence of a fact (which on account of the great length of the trial, the jury might have forgotten) to such an extent as to overrule any recollection that the jury might have had, of that very important and material circumstance" (p. 805).

It is respectfully submitted that what was said in that case very aptly applies in this instance. The Court having stated to the jury what appears to be the general evidence in the case, concluded by telling the jury that it was to decide the case from *those facts,* thus impressing those *particular* facts upon the minds of the jurors.

Inasmuch as the attention of the Court was called to this situation, it seems to me that it was the duty of the Trial Court to have brought the jury back and completed his instruction to them along the lines of the exception taken by the plaintiff.

For the reasons above assigned, it is hereby respectfully urged that the verdict of the jury in favor of the defendants be set aside and a new trial granted the plaintiff.

BENJAMIN M. WEINBERG,
Attorney for and of Counsel with Plaintiff-Appellant.

Arthur W. Cross, Law Printer, 243 Market Street, Newark, N. J.

New Jersey Court of Errors and Appeals

HYMAN KARNITSKY, *Plaintiff-Appellant,* vs. MORRIS MACHANIC and SIDNEY PROSS, *Defendants-Respondents.*	*On Appeal from the Essex County Circuit Court.* *Action at Law.*

BRIEF OF JOHN W. McGEEHAN, JR., FOR DEFENDANTS-RESPONDENTS.

The plaintiff in this case appeals from a judgment rendered in the Essex County Circuit Court in favor of the defendants and relies upon three points in his brief.

The state of the case does not contain a transcript of the evidence taken at the trial, but the charge of the Trial Judge contains a detailed resume of the evidence on pages 10 to 22, inclusive, and, according to the plaintiff's story, corroborated by one witness, he sustained his injuries at the corner of Broad and Green streets, in the City of Newark, by being thrown from the jitney bus of the defendant through its alleged sudden starting, after he re-boarded the step of the same, he having alighted therefrom to permit other passengers to get off.

The defendant and his witnesses testified to an entirely different state of facts. Brown, the driver of the bus, testified that the plaintiff had ridden for a long distance on the step of the bus, although he twice warned him to get inside of it, and to get further back into the bus, and that before he got to the corner of Broad and Green streets the plaintiff had fallen down from the bus without its having stopped or lurched at that time. This was corroborated by the witness Reich, a passenger on the bus, who testified that the plaintiff had ridden all the way on the step from the time he boarded it until he fell and that he saw him fall, that he went off all of a sudden, as he expressed it, "in the wink of an eye," and that there was no unusual motion of the bus prior to his falling (page 16). This witness also testified that they did not stop at Franklin street and the bus did not stop before the plaintiff fell off, and start again. This is further corroborated by another passenger, Mr. Kredentz.

It is submitted that the case presented was certainly one for the determination of the jury upon the matters of fact presented, and the only assignments of error of the plaintiff-appellant are based upon the charge of the Court and the refusal of requests to charge, which will be taken up in their order.

Answer to Point One.

The first point raised in the grounds of appeal was the request of the plaintiff to the Court to charge the following proposition of law:

> "It was not negligence *per se* for the plaintiff to ride upon the step of the bus, if you believe he did so, if he was there with the express or implied consent of the defendant."

What the plaintiff-appellant's brief says the Court says on that subject was as follows:

> "It was not negligence *per se*, negligence in itself, to ride on the step of a jitney bus, if it were crowded."

But it is submitted that the entire charge of the Court illumined the jury throughout upon the test of whether the plaintiff was guilty of negligence in his actions from the testimony in the case. It will be noted that the complaint of the plaintiff specifies in detail the alleged negligence of the defendant in paragraphs 4, 5, 6 and 7 of the complaint (page 5), and alleges:

> "That said jitney bus was permitted, by the servant and agent of the said defendants in charge of said jitney bus, to be and become overloaded and crowded with passengers, so that it was necessary for one or more of them to leave said jitney bus in order to permit other passengers, who intended to alight therefrom, to leave the same.
>
> That when the said jitney bus reached the corner of Broad and Green streets, in the said City of Newark, he, the said plaintiff, was requested by the said servant of the said jitney bus to leave or step down from the same, so as to permit other passengers, who were in the rear of said bus, to leave the same.
>
> That pursuant to the said request of the said servant of the said defendants as aforesaid, he did alight from said bus, in order to permit other passengers to leave the same, after which he, the said plaintiff, started to re-enter the said bus before the same had again started.

> That while he was in the act of entering said jitney bus, the servant of the said defendants in charge of it, as aforesaid, carelessly, recklessly and negligently and without warning to the said plaintiff, suddenly started and propelled the said jitney bus forward, thereby dragging the said plaintiff along the ground and throwing him with great force and violence upon the same."

It is submitted that the plaintiff, in order to make out his case by the evidence was bound to prove substantially that this state of facts existed, and as there was evidence in the plaintiff's case to indicate if the jury believed it that the bus was overcrowded and that that was the theory of the plaintiff's case, then the Court properly charged upon the subject that,

> "It was not negligence *per se,* negligence in itself, to ride on the step of a jitney bus, if it were crowded."

The charge of the Court in general does not, as counsel for the plaintiff-appellant suggests, imply to the jury that it was negligence *per se* to ride on the step of the bus if it were not crowded, for the Court's charge is negative only, and is in consonance with the plaintiff's case, and no express statement by the Court was made to the effect that it would be negligence for the plaintiff to ride on the step if the bus were not crowded.

In the charge of the Court (pages 13 and 14), after reviewing the plaintiff's evidence, the Court states:

> "If this be the correct version of what occurred, you will be justified in finding that the driver of the bus was negligent,"

and in that portion of the charge devoted to the question of contributory negligence (pages 18 and 19) the Court very carefully charged the jury upon the test to be applied to the action of the plaintiff in respect to contributory negligence and charged as follows:

> "The burden is upon the defendant to show negligence on the part of the plaintiff—contributory negligence on the part of the plaintiff. Before you can find contributory negligence it must appear from the greater weight of the evidence. It is necessary for a man to take reasonable care for his own safety, and if he fail to do that and if by that failure the accident occur, then he cannot recover. In other words, if they were both negligent, the driver of the bus and the plaintiff, the plaintiff cannot recover. It was not negligence *per se,* negligence in itself, to ride on

> the step of a jitney bus if it were crowded. As has been said by Justice Trenchard in delivering the opinion of the Court of Errors and Appeals, the highest court of this State: 'It is true that a passenger who voluntarily rides upon the platform step when there is room for him inside of the car takes upon himself the duty of looking out for, and of protecting himself against, the usual and obvious perils attendant upon his position, such as the danger of being thrown from the step by the ordinary jolting and swinging of the car.' That was the situation in this case. If there was room in the car, inside the bus, and the plaintiff was told to go inside of the bus, and if you find as a matter of fact, that the position in which he placed himself was a position of some peril, and if he refused to take that degree of care for his own safety which would be taken by an ordinarily careful and prudent man and thus received his injuries, then he cannot recover."

It is submitted that the obvious effect of the general charge of the Court was to impress the jury with the fact that if there were room in the bus and the driver requested him to enter, and then the plaintiff persisted in riding upon the step, he took upon himself the duty of looking out for and of protecting himself against the usual and obvious perils attendant upon his position from the *ordinary* movements of the car. This is perfectly in accord with the decision of Justice Trenchard in the case of *Trussell* v. *Morris County Tr. Co.*, 79 N. J. L. 533. In the Trussell case (page 535) the Court points out:

> "the evidence warranted the inference that the decedent was riding upon the step of the platform with the consent of the defendant company,"

and the entire question in the case was based upon the non-suit of the plaintiff, which was reversed upon the ground that the alleged contributory negligence of plaintiff's decedent was a jury question.

The case of *Nirk* v. *Jersey City, etc., Street Railway Co.*, 46 Vroom 642, which is referred to in the Trussell case, says (page 645):

> "While it is not negligence *per se* for the passenger to ride upon the platform of an electric street railway car, nevertheless a passenger who voluntarily rides upon the platform, when there is room for him inside the car, takes upon himself the duty of looking out for, and of protect-

> ing himself against, the usual and obvious perils attendant upon his position, such as the danger of being thrown from the platform by the ordinary jolting and swinging of the car,"

and the Court further says (page 646):

> "To that extent, certainly, the general proposition that the defendant company, and its servants as well, were bound to use what is called a high degree of care for the safety of the passengers who entrust themselves to its conveyance was modified by the fact that the plaintiff was standing on the rear platform when it was reasonably to have been inferred that he could have gone inside the car if he had so desired."

These cases are directly in line with the original and quoted charge of the Court in the case at bar. It is submitted that there was no reversible error upon this point in the charge of the Court.

Answer to Point Two.

Point Two raised by the plaintiff-appellant in the brief is that the Court did not specifically charge the second request to charge on behalf of the plaintiff as follows:

> "The defendants having undertaken to carry for hire all persons who applied for passage, are common carriers of passengers, and as such, they owe to their passengers a high degree of care for their safety."

It is admitted that the defendants were common carriers and they and their servants operating the jitney owed a high degree of care in the operation of the jitney bus, but it is submitted that this high degree of care is very clearly pointed out to the jury in the following portions in the charge:

The Court said (page 17):

> "Now, gentlemen, from all this testimony it will be for you to say whether or not the fall of the plaintiff was caused by the negligent operation of that car by Brown, the chauffeur, whether or not he operated his automobile as a reasonably careful and prudent person would operate it, whether or not in view of the high degree of care which is owing by a carrier of passengers to the passengers he did what an ordinarily careful and prudent man would have done."

It is submitted that this can leave no doubt whatever in the mind of the jury as to the measure of care owed by the carrier defendants to the plaintiff passenger in this case.

In *Ruckman* v. *Bergholz,* 37 N. J. L. 437, cited by the plaintiff-appellant, it is true that the Court states that,

> "it should be clear that a mis-direction in a charge has done no injury to the party complaining of it, and if there is reasonable doubt on that head, he is entitled to the benefit of it."

This is true where there has been a *mis-direction,* but the foregoing charge of the Court upon this point was *not a mis-direction,* it is respectfully submitted, so the Bergholz case does not apply, and the Rhode Island case of *McNear* v. *Amer. & Brit. Manfg. Co.,* 107 Atl. 242, does not apply because there was real error in the erroneous charge of the Court that the driver of a pleasure automobile was under the duty to exercise a high degree of care in the management of it, which portion of the charge conflicted with another statement in another part of the charge that the duty was one of reasonable care. But in the case at bar, there is no conflicting portion of the charge and no erroneous charge.

Answer to Point Three.

The third and fourth assignments of error being abandoned in the brief, the fifth assignment of error is hereby answered.

This ground of appeal is based upon the references by the Trial Judge to the evidence in his charge to the jury. It will be noted upon this point that the plaintiff-appellant in his state of the case did not include the transcript of the evidence, and is therefore asking this Court to assume that the evidence is not correctly reviewed. It will be further noted that no exception was taken by the counsel for the plaintiff-appellant to any specific statement made by the Court in its review of the testimony, so that in the absence of a transcript of the evidence intentionally omitted by the appellant, it is submitted that this Court will assume that no variance occurred.

It is true that the Court, after reviewing the testimony at length, said:

> "Now, gentlemen, from all this testimony it will be for you to say whether or not the fall of the plaintiff was caused by the negligent operation of that car by Brown, the chauffeur, etc.,"

but throughout the case the Court refers to the evidence in the case, giving a clear understanding to the jury that it must consider all of the evidence in the case.

On page 12 of the state of the case, the Court says:

> "It seems almost unnecessary to say to an intelligent jury that the mere fact that the plaintiff received the injury would not alone entitle him to your verdict. Before he is entitled to your verdict, it must appear, *and by the greater weight of the evidence in the case,* that the motor bus was negligently operated and that because of that negligent operation he received the injury of which he complains, and that fact must be shown *by the preponderance of the evidence in the case.*
>
> You are, in weighing the evidence, to regard your minds as a scales, evenly balanced. On one side of the scales you should place that evidence indicating to your mind that there was negligence on the part of the driver of the bus; on the other you should place that evidence that he was not negligent. Before the plaintiff is entitled to your verdict the weight of the evidence in the scales must bear that side down, indicating that there was negligence. If the evidence bears down the other side of the scales, then, of course, the defendant would be entitled to your verdict. But, to go a step farther, if the scales still maintain their balance *when all the evidence on both sides is placed in them,* then the defendant is entitled to your verdict. That illustrates what is meant by the preponderance of the evidence, that the scales on the side *where you have placed the testimony of negligence* must weigh down heavier than the other side." (Italics in brief only.)

And on page 18 the Court, as to contributory negligence, in part says:

> "Before you can find contributory negligence it must appear *from the greater weight of the evidence.*" (Italics in brief only.)

And, referring to the injuries and damages of the plaintiff, in part, on pages 21 and 22, the Court says:

> "Now, gentlemen, *whatever damage you find from the evidence* the plaintiff has suffered, the elements of which I have given you, that is, injury, pain and suffering, past, present, and if it is not yet cured, such pain as you think he will suffer in the future as the result of these injuries,

such loss of earnings *as you believe from the evidence* he will suffer in the future may be included in your verdict." (Italics in brief only.)

And in the concluding statement of the Court's long and careful charge, he instructs (page 22):

"However, as I have already said, these elements of damages should not be considered at all *unless you decide that the evidence preponderates that the plaintiff received his injury through* the negligence of the driver of the car, and not even then if you find that there was any negligence on his part which contributed to the accident and injury." (Italics in brief only.)

In support of Point Three, counsel for the plaintiff-appellant cites only one New Jersey case, *The State* v. *Herbert, et al.,* 105 Atl. 796, and quotes from one portion of the opinion, which is decidedly misleading, for the real point of the decision (on page 804) shows that the Court in instructing the jury that the "defendants on trial and Helen Knittel all testified before the Master of the good faith of the divorce. For the State it is *conceded that this statement of the facts was inaccurate as to Weinberg.*"

And the opinion then was (page 805):

"*The statement, made by the Court, had no foundation in fact, and was harmful,* being a material factor in the case to be weighed by the jury, as to Weinberg's connection with the unlawful agreement, and hence bearing materially on his guilt or innocence. And for this reason the plaintiffs-in-error are also entitled to a reversal of the judgment." (Italics in brief only.)

But in the case at bar no misstatement of fact by the Court is alleged by the appellant, and certainly if he alleges no variance between the charge and the evidence and does not even bring the evidence before this Court if he intended to rely on the same, it is submitted that this point cannot be seriously considered.

It is hereby respectfully urged that no error exists in the record, and certainly no harmful error such as to justify a reversal, and that the judgment in favor of the defendant should be affirmed.

JOHN W. McGEEHAN, JR.,
Attorney for and of Counsel with Defendants-Respondents.