

the injury. The horse and wagon being driven by the husband of the plaintiff at the time of the injury, it is claimed by the defendant that his carelessness in driving, if guilty of any such, is to be imputed to the plaintiff, and, if it contributed to her injury, she cannot recover. On that point I direct you that, if you find the injury was occasioned solely by the carelessness of the driver, her husband, the defendant cannot be held liable for the injury thus produced. If her husband's negligence only contributed to the injury, his negligence cannot be attributed to the plaintiff, and must not be regarded as her negligence, so as to defeat her action, where the negligence of the defendant directly contributed to the injury. If you find that the defendant was not guilty of carelessness or negligence as charged, your verdict should be for the defendant, or if the injury was produced wholly by fault of the driver, or if plaintiff contributed to the injury. If you find it was guilty of negligence in the location of the pole in the road, and such negligence produced the injury without the fault of the plaintiff, then you will find for the plaintiff, and assess such damages as will compensate her for the injury.

Verdict for plaintiff. Motion for new trial overruled.

JACKSON, J., sitting with the District Judge to hear the motion, concurred.

SORENSEN *v.* NORTHERN PAC. R. CO.

(*Circuit Court, D. Minnesota.* September 10, 1888.)

1. TRIAL—INSTRUCTION—EXPRESSION OF OPINION ON EVIDENCE.

A trial judge may express an opinion in a charge upon a question of fact, providing the jury are clearly informed that such opinion is not binding upon them, and that they are to decide according to their own judgment.

2. SAME—OBJECTION TO EVIDENCE—SUBSEQUENT IMMATERIALITY—EXPERT TESTIMONY.

It is no ground for the exclusion of medical expert testimony given at the close of plaintiff's evidence that defendant's witnesses developed other facts, and the medical witness was not recalled for further examination.

8. DEATH BY WRONGFUL ACT—CAUSE OF DEATH—EVIDENCE—SUFFICIENCY.

In an action by a personal representative against a railroad company for causing decedent's death by negligence, it appeared that directly after the injury complained of decedent began to fail, and so continued, with but a slight change for the better, until about one year thereafter, when he died. Some two or three years previous to the injury decedent was hurt by the fall of a derrick and had some ribs broken, but he fully recovered, and was a hearty man until the railroad accident. The expert testimony differed as to the cause of the death. *Held*, that the evidence sustained the finding that the injury complained of was the cause.

At Law. Motion for new trial.

Action by Hanna Sorenson, administratrix of the estate of Christopher Sorenson, deceased, against the Northern Pacific Railroad Company, for

negligently causing the death of the intestate. Verdict for plaintiff, and motion for a new trial, which was overruled.

John W. Arctander, for plaintiff.

W. P. Clough and *John C. Bullitt*, for defendant.

BREWER, J. In this case, since the argument of a motion for a new trial, I have read carefully the testimony as well as the briefs of counsel, and will now state my conclusions. Extended comment is unnecessary. In September, 1883, Sorenson, the plaintiff's intestate, jumped from one of defendant's trains, and suffered thereby severe bruises. His jump was at the instance of the conductor, justified by the threatening peril of a collision, and without imputation of blame or negligence on his part. The peril was caused by the culpable negligence of defendant's employes. Soon thereafter Sorenson began to droop and fail, and in September, 1884, he died. That for all injuries directly and proximately caused by the jump from the train defendant is liable is beyond dispute; is indeed not denied by counsel for the company. The contention is that death resulted from heart and aortic troubles existing prior to September, 1883. Physicians were called in on both sides. They differed in opinion. Much of their testimony was purely speculative,—a discussion of possibilities and probabilities. Upon the whole case, and the various matters discussed by counsel with great thoroughness and ability, I remark briefly:

1. Expression of opinion upon questions of fact by the trial judge is permissible, providing the jury are clearly informed that such expression is not binding upon them, and that they are to exercise their own judgment.

2. There is no objection to a plaintiff's closing his case with medical and expert testimony based upon the facts as then presented, and no rule recognizing the exclusion of such testimony, if, other facts being developed by defendant's witnesses, the medical witness is not recalled for further examination.

3. Where medical witnesses disagree in opinion and theory, the undisputed history of the case is often the most satisfactory and controlling fact. In this case such history fully justified the verdict. While some two or three years before this injury Sorenson had been injured by the fall of a derrick, and had two or three ribs broken, yet he soon recovered therefrom, and was a strong, hearty, and hard-working man until this time. Soon after this accident he began to droop and fail, and so continued failing, with a short and slight change for the better in the spring of 1884, until his death in September, 1884. Such a fact is significant, and upholds the verdict. I know that *post hoc* is not always *propter hoc*, but where the *propter hoc* is uncertain, the *post hoc* may often be decisive.

I cannot think that another trial upon similar testimony would result differently. Hence, passing all minor questions, I think the motion for a new trial must be overruled; and it is so ordered.

HERSHEY v. O'NEILL.

Circuit Court, S. D. New York. September 5, 1888.)

1. MALICIOUS PROSECUTION—PLEADING—NEGATIVE PREGNANT.

The complaint, in an action for malicious prosecution and false imprisonment, alleged that defendant, by his agents, arrested plaintiff on a false charge, without authority or reasonable cause. The answer denied that defendant or his agents falsely or maliciously or without reasonable cause did any of the acts alleged. *Held* that, while the answer contained a negative pregnant, yet, as a subsequent paragraph alleged that one of defendant's clerks, having reasonable cause to believe that plaintiff had committed larceny, caused her to be arrested by a police officer, it did not admit that the arrest was made by defendant, and deny only the allegation of malice. Especially should this view be taken as the objection was not made until the trial, and plaintiff had not been misled.

2. SAME—PROBABLE CAUSE—ARREST BY PRIVATE PERSON.

Plaintiff testified on the trial that she went to defendant's store, where she was unacquainted, took an umbrella from the counter, and, to enable her to examine it more closely, carried it a short distance to the light near the door, when she was roughly seized by defendant's salesman, and pushed through the store into the basement. After an examination there, in presence of a policeman and others, she was arrested, taken to the station-house, and, after another examination, locked up until bail was given. She was subsequently tried and acquitted. Defendant proved that the umbrella counter was 40 or 50 feet from the door, and was in the lightest part of the store. Several witnesses testified that plaintiff took the umbrella, walked out of the store, and was proceeding down the street, having pulled off the tag, when the salesman politely touched her, and requested her to return into the store, and the two walked quietly to the ladies' lunch-room, in the basement; that she confessed her guilt then, and afterwards to the captain of police. *Held*, that a verdict for defendant would not be disturbed, as the salesman had used no force, and as, upon defendant's testimony, a larceny had been committed, justifying an arrest by a private person.

3. SAME—PRINCIPAL AND AGENT—SPECIAL PATROLMEN.

Under Laws N. Y. 1884, c. 180, § 269, providing that special patrolmen shall be subject to the orders of the superintendent of police, etc., and shall possess all the powers and discharge all the duties applicable to regular patrolmen, a special patrolman is not the mere servant of a person on whose premises he is appointed for duty, and by whom his salary is paid, and such person is not responsible for his official acts.

4. SAME.

A person is not liable for an arrest made by a policeman on information furnished by such person's clerk without his knowledge or authority.

On Motion for New Trial.

This is an action for false imprisonment and malicious prosecution. On the 4th of August, 1887, the plaintiff, a resident of Philadelphia, came to the store of the defendant, on Sixth avenue, New York, in company with a female friend. She had never been there before, and was a total stranger to the defendant and his employes. Her version of the subsequent occurrences is as follows: She says she went to the umbrella counter, took up an umbrella, and, to enable her to examine more closely the quality of the silk, carried it a short distance to the light near the door. While she was adjusting her eye-glasses for this purpose, she was roughly seized by the arm by Saunders, a salesman of the defendant, and pushed through the store, and into the basement. After an examination there,