In Memoriam

Ernest A. Michel

October 15, 1887 • August 4, 1947

Annual Memorial Services
Hennepin County Bar Association
District Court
Fourth Judicial District
Minneapolis, Minnesota
1948

To the Members of the
Hennepin County Bar Association,
Fellow Lawyers —

As we meet today to pay tribute to the Brothers of our profession called to their reward in the past year, it necessarily causes one to pause and realize that our lives are transitory — are transitory indeed.

It is my privilege to express words of tribute to Ernest A. Michel, a Member of this Bar, a lawyer of unquestionable ability and a man who had the love and affection of his Brother lawyers to a very marked degree.

I speak not only as a partner of Ernest A. Michel, but as one who grew up with him and who had known him for more than forty years.

It was in 1906 in the little town of Marshall, Minnesota, that Ernest Michel came in my office and started to work for me on July 16th. He was young, ambitious and a hard worker. He did the shorthand and all other work incident to the carrying on of business in a country office. He was methodical and was on the job far more hours than his indolent partner.

When he passed the Bar in 1908, Ernest and I became partners and for thirty-nine years the firm of Davis and Michel carried on our business as lawyers in Minnesota. Ernest Michel had the confidence and regard of the Judges, both of the State and Federal Courts, who recognized his keen ability and his devotion to the cause of his client.

I perhaps am prejudiced in some ways for I knew him so intimately and so well, not only as a friend, but a confidant.

Mr. Michel had, perhaps, a greater experience in presenting cases in the Circuit Court of Appeals of the United States and the Supreme Court of the United States than most lawyers in Minnesota.

While we were at Marshall, we tried the noted case of *Otos vs. Great Northern Railway Company*, 129 Minn. 283, 150 N.W. 922 [1915]

— Affirmed 239 U.S. 349, 36 Sup. Ct. 124, 60 L. Ed. 322 (1915), and the briefs prepared in this case were the work of Ernest Michel. I will never forget being with him in Washington, when we are admitted to the Supreme Court United States, preparatory to the argument in the *Otos* case.

After practicing at Marshall, Minnesota, for some eleven years we moved to Minneapolis and located at 419 Metropolitan Bank Building. During all these years the real work of the office was done by Ernest Michel and if I might be accused of having any success as a trial lawyer, I want to say now that I owe very very much of it to the help and inspiration given me by this brilliant man.

During his practice as a lawyer, he not only prepared briefs and argued cases in the Supreme Court of Minnesota, but also the Supreme Courts of Illinois, Michigan, Indiana, North and South Dakota, Montana, Iowa, and many other States, and he also prepared briefs and argued many cases in the Circuit Court of Appeals and the United States Supreme Court with marked success.

He was a bear for work; he loved the law; and, perhaps, had a better comprehension of the Federal Employers' Liability Act, governing the rights of railroad workers in the United States, than any lawyer in the country.

Some five years ago he was stricken with the dread disease of cancer, but such was his courage, his love of life, his desire to carry on, that he battled this scourge of mankind to the end, always hoping— always praying— always believing that he could lick it.

He had faith in the causes he represented; he had faith in himself, and he did so much want to live and carry on. It was, however, ordained that he pass away—in the early years of his life—only 59 years of age.

With his passing, I confess, I not only lost one of the ablest lawyers I have ever known, but I have also lost a friend and a confidant, a man

whom I have often said: "certainly had great patience and a marvelous disposition to endure association with me for forty-one years."

His influence will be felt for many years to come and younger lawyers reading the reports of cases he has argued in the State Supreme Court and the Circuit Court of Appeals cannot avoid the conclusion that here was a lawyer who knew his case.

July 16, 1947, was the Forty-first Anniversary of Ernest Michel coming to join me in the practice of law at Marshall, Minnesota. At that time he was failing rapidly. He did not know it — he would not believe it. On that day Ernest I had a reunion at Charlies and talked over the old times and he was looking well and feeling chipper and we all had hopes that perhaps he could win this law suit— the last lawsuit he ever had to fight.

I left for Wyoming shortly afterwards, but had hardly arrived there when I received word of his serious set-back and hurried by plane to Minneapolis, arriving on Monday morning, August 4, 1947, 6:30 in the morning and then was stunned by the news that a half an hour before my arrival, my partner and friend had answered the final roll call.

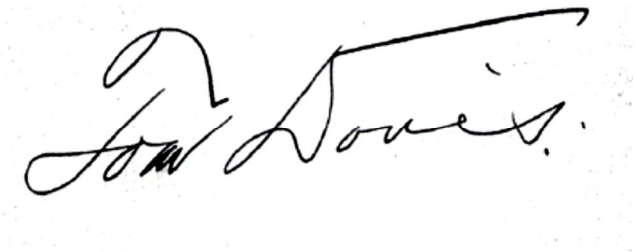
When one loses a dear friend, or a friend, something goes out of his life, but it seems to me that also a Divine Providence compensates in a marked degree in the inspiration and courage which the one who has gone leaves behind for those whom he loved and for whom he lived.

The funeral services for Ernest Michel were simple and in keeping with what he would have wanted. The floral offerings sent by those had lost and loved him would have given him a great thrill for he loved flowers —he loved nature —he loved the great out-of-doors.

On that occasion I am sure it was a solace to his loved ones to know that lawyers and judges from all over the state of Minnesota and nearby states came to pay their last tribute to his memory.

One sentence in the holy writ typifies to my mind the life and career of Ernst A. Michel:

"He fought a good fight; he finished his course; he kept the faith."



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(1912)

ERNEST A. MICHEL (1906) is the junior member of the law firm of Davis & Michel, of Marshall. He was born at Appleton, Minnesota, October 15, 1887, and spent his boyhood days in that town. He was graduated from the Appleton High School and then took a year's course in a business college.

In 1906 Mr. Michel located in Marshall. He entered the employ of Thomas E. Davis as a stenographer and at the same time read law. He was admitted to the bar February 8, 1909, and in July, 1910, entered into partnership with his employer. Mr. Michel is a member of the Elks and Modern Woodmen lodges.

Ernest Michel is the son of the late Ernest Michel and Caroline (Schmidt) Michel. They came from Germany when children, were married, and located in Michigan. They became residents of Willmar, Minnesota, in the early days and for a time conducted a hotel in that city. Then they moved to Appleton, where Mr. Michel died and where Mrs. Michel now resides. Ernest is the youngest in a family of fourteen children, of whom ten are living.

Note: According to his Minnesota death certificate, Ernest Adolph Michel was born in Germany on October 15, 1887.

Otos v. Great Northern Railway Company

VOL. 128

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF MINNESOTA

DECEMBER 18, 1914—MARCH 5, 1915

HENRY BURLEIGH WENZELL
REPORTER

LAWYERS' CO-OPERATIVE PUBLISHING CO.
ST. PAUL
1915

H. W. OTOS v. GREAT NORTHERN RAILWAY COMPANY.[1]

January 29, 1915.

Nos. 18,955—(182).

Interstate commerce.

1. A car in process of transportation from one state to another is in transit and is being used in interstate commerce while being switched at an intermediate yard with other interstate cars, although there may be a purpose to switch the defective car to a repair track for repair of a defective coupler before it leaves the yard. The Federal Safety Appliance Act and the Employer's Liability Act apply to such a car.

Injury to brakeman — proximate cause.

2. The act of a switchman in stepping between moving cars to make an uncoupling because of a defective coupler is not the sole proximate cause of an injury received by him while so doing. The violation of the statute is a contributing cause of the injury.

Damages not excessive.

3. The damages as reduced by the trial court are not excessive. Defendant was not entitled to a reduction of the amount of plaintiff's damages because of a prospect that a surgical operation might relieve part of his injury.

Action in the district court for Yellow Medicine county to recover $80,000 for personal injuries sustained while brakeman in defendant's employ. The case was tried before Flaherty, J., and a jury which returned a verdict in favor of plaintiff for $35,000. Defendant's motion for judgment notwithstanding the verdict was denied, and its motion for a new trial was granted unless plaintiff consented

[1] Reported in 150 N. W. 922.

Note.—On the question of the constitutionality, application, and effect of the Federal Employer's Liability Act, see note in 47 L.R.A.(N.S.) 38. And as to the duty and liability of the master under the Federal and State Railway Safety Appliance Acts, see notes in 20 L.R.A.(N.S.) 473 and 41 L.R.A.(N.S.) 49.

The question whether the negligent condition of a place or appliance is the proximate cause of injuries not primarily caused by that condition is considered in a note in 40 L.R.A.(N.S.) 940.

to a reduction of the verdict to $30,000. From the order denying defendant's motion for judgment notwithstanding the verdict or for a new trial, it appealed. Affirmed.

M. L. Countryman and *A. L. Janes,* for appellant.

John I. Davis, Tom Davis and *Ernest A. Michel,* for respondent.

HALLAM, J.

Plaintiff was a switch foreman in defendant's yards at Willmar. On September 11, 1912, a train came into Willmar from the west. It contained, among others, a loaded car from Willow Lake, South Dakota, consigned to Minneapolis. This car was coupled with automatic couplers to a car consigned to Duluth, by way of Superior, Wisconsin. The pin lifter on the Minneapolis car was out of order. At Willmar the Duluth car was to be transferred to another train. There is some evidence that the Minneapolis car was to be switched to the repair track, before it proceeded further, for the purpose of repairing the coupler. There is no evidence that it was ever so transferred. The car was carried to Minneapolis on the following day. Plaintiff and his crew were engaged in cutting up this train and switching the cars to be removed from it to their proper destination. At the time of the accident he had three cars attached to a switch engine; the Duluth car was in the rear and the Minneapolis car in the middle. Plaintiff was about to cut off the Duluth car in order to switch it to the Duluth track. He stood on the side from which the pin lifter was missing. He could not make the uncoupling from that side without going in between the cars. This he did, and in doing so he was run over and sustained severe injuries.

It is conceded that defendant's road at Willmar is a highway of interstate commerce and that the traffic in which this car was engaged when in transit was interstate traffic, and that if it was in transit at this time, then, under the Federal Safety Appliance Acts and Employer's Liability Act, defendant is liable for any injury caused by the defective coupler, and neither contributory negligence nor assumption of risk constitutes any defense. The contention of defendant is that "the condition of the car was such that it had to go to a repair track for repairs;" that "it was necessary that the through

movement of the car be interrupted at Willmar for the purpose of repairs," and that therefore "the defective car had been withdrawn from commerce" and was "not in the course of transit."

We are of the opinion that at the time of plaintiff's injury this defective car was in transit and was being used in interstate commerce. A car in process of transportation from one state to another is usually in transit and engaged in commerce from the time it is started upon its passage until the delivery of its cargo at the place of destination. U. S. v. Colorado & N. W. R. Co. 157 Fed. 321, 85 C. C. A. 27, 15 L.R.A.(N.S.) 167, 13 Ann. Cas. 893. It is not taken out of commerce because in need of repair, nor because of a purpose to repair it, nor because of a design to set it upon a repair track in due course for that purpose. We need not consider what the situation might have been if this car had been set at rest on the repair track. This had not been done. At the time of the accident it was still part of an interstate train. Its cargo had not reached its destination and was not ready for delivery to the consignee. It was attached to and was being moved with another interstate car, from which it was in due course being uncoupled. Clearly the defective car was in transit and was being used in interstate commerce.

The Federal decisions leave no doubt upon this point.

In Delk v. St. Louis & San Francisco R. R. Co. 220 U. S. 580, 31 Sup. Ct. 617, 55 L. ed. 590, a car loaded and being used in moving interstate traffic was found with a defective coupler. The car was marked "in bad order," and a repair piece sent for, but the company kept on moving it about in connection with other cars, and finally ordered the injured employee to couple it to another car. This he tried to do and was injured. It was held that the car in question was being used in interstate traffic.

In Chicago, M. & St. P. Ry. Co. v. United States, 165 Fed. 423, 91 C. C. A. 373, 20 L.R.A.(N.S.) 473, it was said that, if a car is one of the connecting links between the engine and the caboose and a constituent part of a train moving on an interstate mission, the car is engaged in interstate commerce. See also Erie R. Co. v. Russell, 183 Fed. 722, 106 C. C. A. 160; Southern Ry. Co. v. Snyder, 205 Fed. 868, 124 C. C. A. 60.

2. Defendant contends that the proximate cause of plaintiff's injury was not the defective condition of the coupling, but his violation of a rule of the employer forbidding employees going between moving cars. It appears that there was such a rule. There is evidence that in this yard it had, with the knowledge of the yardmaster, been more honored in its breach than in its observance. But, whatever may be said of the propriety of plaintiff's act in going between the cars, it was only one of the concurring causes of plaintiff's injury. The violation of the statute was one cause of his injury. Turrittin v. Chicago, St. P. M. & O. Ry. Co. 95 Minn. 408, 104 N. W. 225; Sprague v. Wisconsin Cent. Ry. Co. 104 Minn. 58, 116 N. W. 104. This is all that is necessary to create liability. The statute which abolishes contributory negligence "would be nullified by calling plaintiff's act the proximate cause, and then defeating him, when he could not be defeated by calling his act contributory negligence. * * * It is only when plaintiff's act is the sole cause—when defendant's act is no part of the causation—that defendant is free from liability under the act." Grand Trunk Western Ry. Co. v. Lindsay, 233 U. S. 42, 47, 34 Sup. Ct. 581, 582, 58 L. ed. 838, Ann. Cas. 1914C, 168, quoting 201 Fed. 844, 120 C. C. A. 166.

3. The jury assessed plaintiff's damages at $35,000. The trial court reduced the amount to $30,000. Plaintiff was 26 years old at the time of his injury and was earning from $105 to $115, a month. His left leg was amputated within two inches of the hip joint, so close to the body that the use of an artificial leg is impossible. There was not sufficient skin to cover the stump, and scar tissue was formed. Four different operations have been performed for the purpose of engrafting skin upon the stump. Several more were performed to remove cinders or to open abscesses that had formed. Two nerve tumors have formed upon the stump, caused by the ends of the nerves being imbedded in the scar tissue. These are intensely painful to the slightest touch, and they cause intense spasms of pain on pressure or movement. From some cause, perhaps because of these nerve tumors, plaintiff suffers intense pain in the small of the back so that he can neither sit up nor use a crutch. There is evidence

that these conditions are permanent, in fact it is conceded that they can only be relieved by further surgical operation.

Defendant contends there is a practical way of improving plaintiff's condition. It offered evidence that the nerve tumors may be removed by a surgical operation and that their removal will remove the cause of pain in the stump and in the back, and to all intents and purposes restore plaintiff's general health. Defendant claims it is the duty of plaintiff to submit to such operation, or, if he chooses not to do so, that the injuries which may be remedied by an operation should not be considered in measuring his damages. This suggested operation is described as follows: "Cut down on the stump and resect these diseased nerve endings, pulling them out and cutting off higher up, and then by stitching the end of the cut nerve together, pulling it over, to prevent a recurrence of a similar condition, and sewing the end up so as to leave no raw surface exposed." It is conceded that after such an operation there is liability of recurrence of these nerve tumors, and that in some cases as many as three operations have been required.

We are of the opinion that plaintiff was entitled to an assessment of damages based on the condition he was in at the time of the trial. A person who sustains damage at the hands of another, whether through breach of contract or through tort, is required to take all reasonable measures to reduce his damage, but we cannot carry this doctrine to the extent of holding that this plaintiff, who had already submitted to an amputation which a "great proportion of men * * * do not survive," and a number of lesser operations, is under any obligation to submit to another surgical operation of the character described in pursuit of an uncertain prospect of lessening his injury and his damage. Maroney v. Minneapolis & St. L. R. Co. 123 Minn. 480, 144 N. W. 149, 49 L.R.A.(N.S.) 756, and cases cited.

There is some evidence that plaintiff's injury has caused permanent impotence, due to the interruption of the course of certain nerves. The testimony on this subject is sharply in conflict. Injury of this sort is very easy to feign or exaggerate and very hard to disprove. Temporary loss of sexual power is the usual concomitant of almost

every severe injury or illness, and cannot usually be considered as a distinct element of damage. Bucher v. Wisconsin Cent. Ry. Co. 139 Wis. 597, 120 N. W. 518. At the same time, where there is tangible proof that by reason of direct injury to the generative organs or the nerves that prompt their action, and resulting impotence, there is no good reason why this element may not be considered. Where the proof rests upon opinion evidence, it should be closely scrutinized, but it cannot in all cases be rejected entirely. In this case there is evidence of injury to the pudic nerve, and also evidence that every known test indicates present impotence, and there is expert evidence based upon this alleged organic injury that impotence will be permanent. We think the court cannot say as a matter of law that this evidence should have been wholly disregarded. However, it seems to us that this verdict can be sustained without resting largely upon this claim. Aside from this element of damage, the case is in no sense parallel to those involving the mere loss of one leg. In fact many men who have sustained amputation of both legs, as in Sprague v. Wisconsin Cent. Ry. Co. 104 Minn. 58, 116 N. W. 104; Whitehead v. Wisconsin Cent. Ry. Co. 103 Minn. 13, 114 N. W. 254, 467, are in no worse plight than this plaintiff. We are not disposed to further disturb the amount of this verdict.

Order affirmed.

Otos v. Great Norther Railway Company

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CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF MINNESOTA

MARCH 5, 1915—JUNE 4, 1915

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REPORTER

LAWYERS' CO-OPERATIVE PUBLISHING CO.
ST. PAUL
1915

H. W. OTOS v. GREAT NORTHERN RAILWAY COMPANY.[1]

March 9, 1915.

Nos. 18,955—(122).

After the former appeal reported 128 Minn. 283, 150 N. W. 922, defendant appealed from a judgment entered in favor of plaintiff in the district court for Yellow Medicine county. Affirmed.

M. L. Countryman and *A. L. Janes*, for appellant.

John I. Davis, *Tom Davis* and *Ernest A. Michel*, for respondent.

PER CURIAM.

This appeal involves only questions which were determined on appeal from an order denying a motion for a new trial in the same case, 128 Minn. 283, 150 N. W. 922. For the reasons there given, the judgment now appealed from is affirmed.

[1] Reported in 151 N. W. 1102.

CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1915.

. . .

GREAT NORTHERN RAILWAY COMPANY *v.* OTOS.

ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

No. 429. Argued November 30, 1915.—Decided December 13, 1915.

A car, coming from another State, which is merely delayed in the State of destination before reaching, and which does finally reach, its destination, is not, by reason of such delay, withdrawn from interstate commerce and the operation of the Safety Appliance Act.

While the supplementary Safety Appliance Act of 1910 relieves the

carrier from statutory penalties while hauling the defective car to the nearest available point for repair, it does not relieve the carrier from liability for injury to an employé in connection with such hauling.

Under the circumstances involved in this action under the Employers' Liability Act, the trial court did not err in charging that if the injuries were directly due to defective condition under the Safety Appliance Act of couplers of a car which had come from without the State to the point where the accident occurred, and which was destined to another point within the State, the defendant carrier would be liable.

128 Minnesota, 283, affirmed.

THE facts, which involve the construction and application of the Safety Appliance Act in cases for injuries under the Employers' Liability Act, are stated in the opinion.

Mr. E. C. Lindley, with whom *Mr. M. L. Countryman* and *Mr. A. L. Janes* were on the brief, for plaintiff in error.

Mr. Tom Davis, with whom *Mr. Ernest A. Michel* was on the brief, for defendant in error.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an action under the Safety Appliance Act and Employers' Liability Act. The plaintiff (defendant in error,) was a switch foreman and was breaking up a train that had come into his State from the west. At the moment when he was hurt he had three cars attached to a switching engine; the rear one consigned to Duluth, and to be switched to another track; the next consigned to Minneapolis; both loaded. The automatic coupler on the Minneapolis car was out of order, the pin-lifter was missing, other repairs were needed, and there was evidence that it had been marked for repairs and was to be switched to the repair track before going further. In the switching operation the plaintiff, being unable to uncouple the Duluth car from the side where the pin-lifter was missing without going between the cars, did so while the cars were moving and was badly hurt. The jury was instructed that

if the injuries 'were due directly to the absence and imperfect working condition of the coupler in question' the defendant would be liable. The plaintiff got a verdict and judgment was ordered for $30,000, which order was affirmed by the Supreme Court of the State. *Otos* v. *Gt. Northern Ry.*, 128 Minnesota, 283. 150 N. W. Rep. 922.

The defendant argues that the car had been withdrawn from interstate commerce, and that therefore the Act of March 2, 1893, c. 196, § 2, 27 Stat. 531, does not apply; that if it does apply the defendant was required by that act and the supplementary Act of April 14, 1910, c. 160, 36 Stat. 298, to remove the car for repairs and that its effort to comply with the statutes could not constitute a tort; and that the plaintiff was the person entrusted by it with the details of the removal and could not make it responsible for the mode in which its duty was carried out; that he might have detached the car while it was at rest. But we are of opinion that the argument cannot prevail.

The car was loaded and in fact was carried to Minneapolis the next day. It had not been withdrawn from interstate commerce, but merely subjected to a delay in carrying it to its destination. At the moment of the accident it was accessory to switching the Duluth car. It does not seem to us to need extended argument to show that the car still was subject to the Act of Congress. *Delk* v. *St. Louis & San Francisco R. R. Co.*, 220 U. S. 580. As the Safety Appliance Act governed the case, it imposed an absolute liability upon the carrier. *St. Louis, Iron Mountain & Southern Ry. Co.* v. *Taylor*, 210 U. S. 281. *Chicago, Burlington & Quincy Ry. Co.* v. *United States*, 220 U. S. 559. The supplementary Act of April 14, 1910, c. 160, § 4, relieves the carrier from the statutory penalties while the car is being hauled to the nearest available point where it can be repaired, but expressly provides that it shall not be construed to relieve from liability for injury to an employé in connection with the hauling of the car. The

next section recites that under § 4 the movement of a car with defective equipment may be made within the limits there specified without incurring the penalties, 'but shall in all other respects be unlawful.' Whether or not the absolute liability created by the earlier act extended to the present case, and we are far from implying that it did not, the Act of 1910 imports with unmistakable iteration, that the liability exists. Under the instructions of the court the jury must have found that the defect was the proximate cause of the injury, as that was made a condition of the plaintiff's right to recover. If so, the fact that the plaintiff's conduct contributed to the result was not a defense. Act of April 22, 1908, c. 149, §§ 3, 4; 35 Stat. 65, 66. *Grand Trunk Western Ry.* v. *Lindsay*, 233 U. S. 42. In view of the statutes it is unnecessary to consider the limits to the plaintiff's authority by his instructions from above. In any view of the evidence he was not withdrawn from the protection of the Acts.

Judgment affirmed.