FORT v. UNION PAC. R. CO.

Case No. 4,952.

{2 Dill. 259;[1] 11 Am. Law Reg. (N. S.) 101.}

Circuit Court, D. Nebraska. Nov. 10, 1871.[2]

NEGLIGENCE—LIABILITY OF MASTER TO SERVANT FOR ACTS OF FELLOW-SERVANT—DAMAGES.

1. A railroad company is liable for the negligent act of a foreman having charge of dangerous machinery, who, in the course and within the scope of his duties, orders an infant employé under him upon a service hazardous to life or limb, and which was not within the scope of the ordinary or proper duties of the servant thus commanded to perform it; in such a case the rule which exempts the employer from liability to one servant for the negligence of a fellow-servant in the same common service, has no just application.

{Cited in Evans v. Atlantic & P. R. Co., 62 Mo. 50; Lehigh Val. Coal Co. v. Jones, 86 Pa. St. 440; Stephens v. Hannibal & St. J. Ry. Co., 86 Mo. 223.}

{See note at end of case.}

2. Damages down to and even beyond the day of trial may, in proper cases, be given.

Action by the plaintiff {Jesse L. Fort} for an injury to his minor son when in the employment of the defendant. The allegations of the petition in respect to the manner in which the injury was caused are as follows: "Plaintiff further says that on or about October 1st, A. D. 1867, plaintiff's minor son, James H. Fort, then aged about sixteen years, was hired and employed by defendant to work in defendant's machine shop in the city of Omaha; that a portion of said shop and the machinery therein was under the superintendence and control of one Collett, agent and servant of said defendant; that said Collett, being grossly negligent and careless in so doing, did order and direct (being thereto duly authorized by defendant, and said minor as such employé being under him as such superintendent) said minor to ascend to a great height, to-wit—twenty feet from the floor of said shop, and among rapidly revolving and dangerous machinery, for the purpose of adjusting a certain belt by which a portion of said machinery was moved; that said undertaking was a hazardous one even for an adult to perform; that said minor undertook to perform said order, but in attempting so to do was caught by the right arm by said belt, said belt being caught by a certain key which was improperly projecting from the shafting near which he was so directed to go, and said arm torn from his body; that said minor was guilty of no negligence or carelessness in attempting to discharge said order, but that he was compelled to obey all orders and directions of said Collett pertaining to his said employment."

The answer puts in issue the substance of these allegations in regard to negligence.

After the evidence was produced, the jury were charged as follows by the circuit judge:

"1. This action is brought by plaintiff to recover damages for an injury to his minor son, resulting in the loss of an arm while in the employ of the defendant. That the plaintiff's

son was employed by the defendant, and by an accident his arm was torn off by machinery in the car shop of the defendant, are facts which are admitted. Evidence has been offered tending to show that the defendant, in its works at this city (Omaha) had a car department, of which Mr. Gamble was the superintendent; that under him, and having

immediate control of the shop, was a foreman, Mr. Ballou; that under the foreman there were various sets, or, as a witness called them, 'gangs,' of men, under the immediate direction and control of some employé or 'boss;' that, among those having control of a set or gang of men working in the shop was a Mr. Collett (named in the petition); that Collett's duty was to run and superintend the running of a certain machine, or certain machinery, in the shop; that, from the time the plaintiff's son was employed he had been working under Collett, obeying his orders and directions; that the chief employment of the son had been at a moulding machine, receiving and putting away mouldings as they came from the machine. After the son had been thus engaged for some months, the evidence tends to show that, on the day the accident in question happened, a belt or band connected with a shaft, some fourteen or sixteen feet high, was off the drum, or pulley, and needed lacing. It does not very clearly appear, perhaps, whether the belt thus out of order belonged to the moulding machine or some other machine near by; but there is evidence tending to show that it was within the scope of Collett's duty to see that it was repaired. The plaintiff has given evidence, which has not on this point been opposed by any evidence produced by the defendant, that at the time of the accident, Collett, wishing to lace the band at the end near the floor, ordered the plaintiff's son, about sixteen years of age, to ascend a ladder resting on the shaft at the upper end, which shaft was in motion at the rate of one hundred and seventy-five or two hundred revolutions per minute, and hold or keep the band or belt away from the shaft, while he (Collett) laced or sewed it together at or near the floor;, and the right arm of plaintiff's son, while thus engaged, pursuant to the orders of Collett, was caught, or in some way became entangled, in the belt, or drawn between it and the shaft, and was instantly crushed to pieces and torn from his body. The plaintiff has offered evidence tending to show that he hired his son to the defendant to work in the car shop, making the contract with Mr. Gamble, the superintendent; that at the time Mr. Gamble went with the son into the shop, and directed him, in Mr. Collett's presence, to help Collett, or work under him, and obey his orders. Upon the evidence, I do not understand it to be claimed by the plaintiff that the accident was caused by the defect in the key (the only defect alleged in the pleadings as to the machinery), and on the trial no question has been made as to Collett's general skill, fitness, and capacity for the performance of the functions or duties assigned to him; and the specific ground on which the recovery is claimed is that Collett, in ordering the plaintiff's son to ascend the ladder and perform the service before mentioned, considering the age of the boy and the nature of the service required of him (which is claimed by the plaintiff to have been dangerous to life and limb), was guilty of a wrongful or negligent act, which resulted in the injury for which this action is brought.

"2. There is no statute in the state of Nebraska relating to the liability of masters to servants, and the rules regulating such liability must be found in the general principles

of the law as declared by the courts. One of these principles, too often decided by all the English, and most of the American, courts, to be now denied, is, that a master is not liable to his servant or employé for the negligence of a fellow-servant while engaged in the same common employment or service, unless he has been negligent in the selection of the servant in fault, which is an element, as before observed, not in this case. And this doctrine has been extended by the English, and by many of the state courts in this country, to all persons serving the same master in the same employment, whether equal, inferior, or superior in grade, to the servant injured, and the fact that the injured servant was under the control of the servant by whose negligence the injury was caused, has been considered to make no difference in the application of the rule. Although the rule, particularly this extension of it, so as to exempt a master for the negligence of a servant within the scope of his employment, who has the control of another servant, for an injury to the latter, caused by his obeying the orders of his superior, has met with much, and perhaps, just and reasonable opposition; yet, it has been so often and so generally decided, that it is doubtful how far a court, whatever may be its own convictions, is at liberty to disregard it. But I do feel free to refuse to extend the rule to cases to which the reason on which it rests does not apply. The reason of the doctrine is, that a servant or employé, in making his contract must be presumed to take into account all the ordinary risks of the business on which he proposes to enter, and obtains a compensation which, upon the average, covers these risks, amongst which are included negligence of fellow-servants in the same common employment, but he is not presumed to take into account a risk not included in his employment, and which, therefore, he has no reason to anticipate. In deciding this case, you should determine the nature of the employment on which the plaintiff engaged that his son should serve. If you find that his contract of service, or the duties which he engaged to perform were such that it was within the contract, or within the scope of those duties, that the son should assist in the repair of the machinery in question, and that the son, when injured, was in the discharge of a duty or service covered by the contract of employment, then the company is not liable for the negligence of Collett (if he was negligent), with respect to ordering the son to ascend the ladder and hold the belt away from the

shaft. But I draw this distinction: If the work which the son was ordered by Collett to do was not within the contract of service,—was not one of the duties which fell within the contract of employment, but was outside of it, then Collett, in ordering the service in question (if he was in scope and course of his duties and power at the time), must, as to this act, be taken to represent the company (which is presumed to be constructively present), and if that act was wrongful and negligent, as hereinafter defined, the company, his employer, would be liable for the damages caused by such negligent and wrongful act; and the principle before adverted to, that the master is not liable for the neglect of a co-employé in the same service has, in my judgment, no application, or no just application, to such a case; for in such a case they are not, in any proper sense, 'fellow-servants' in the same common service.

"3. This action is based essentially upon the alleged negligence of Collett, and the negligence imputed consists in the nature of the order which he gave the plaintiff's son. If, under the foregoing instructions, you find that the company is liable in respect to the act of Collett in ordering the boy up the shaft, you will then have to inquire whether that act was wrongful and negligent. Now, gentlemen, that depends upon the circumstances of the case, which you should attentively consider. An employer is not an insurer of the lives and limbs of his men, but he does impliedly engage that he will not expose them to unnecessary, unusual, and unreasonable risks to life, or serious bodily injury. Negligence is the omission to do something which a reasonable, prudent man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do, under all the circumstances surrounding and characterizing the particular case; and in this case it is the duty of the jury to consider the age, and experience, and extent of judgment of the boy, and the nature of the service demanded of him, in respect to its being hazardous to life or limb, or otherwise. If a reasonable and ordinarily prudent man would not have ordered a boy of his age, under the circumstances, upon such a service, because it was dangerous, then it was a negligent and wrongful act; but if it could not, by a man of reasonable prudence and sagacity, have been foreseen that the service demanded was perilous to the life or limb of the boy, the company is not liable, although the act required of the boy was one not falling within the scope of his employment.

"4. This is an action by the father for loss of service of the son, and under the pleadings he can only recover pecuniaiy damages, which include actual or necessary expenditures for supplies for the son during his recovery, the value of his and his family's necessaiy attention to the son, and the value of the loss of the services of the son from the date of the accident down to the time of trial."

The jury returned a general verdict for the plaintiff in the sum of $2,264.92, if the damages be computed only to the date when suit was brought, March 10, 1870, but in the

sum of $3,056.58, if damages be computed to the time of trial, November 10, 1871. The jury also made the following special finding in regard to the nature of the employment of Collett and of the plaintiff's son, and the cause of the injury, to-wit: "We find that the car department of the defendant was under the management of a general superintendent, who employed and dismissed the hands; that the shop, as to practical operations therein conducted, was under a foreman; that the employés were divided, according to their work, into sets, with an under or immediate foreman; that one of these under-foremen was Mr. Collett, named in the petition, under whom plaintiff's son was to and did serve, as a workman or helper, and whose orders he was to and did obey; that Collett had charge of running and superintending certain machinery in the shop. We find that the plaintiff's son was injured in executing or carrying out an order of Collett, as described in the petition; that this order related to a matter within the scope of Collett's duty and employment. We find that the order to the plaintiff's son (in carrying out which he lost his arm) was one which was not within the scope of the son's duty and employment. We find that it was not a reasonable order, and that its execution was attended with a hazard to life or limb, and that a prudent man would not have ordered the boy to execute it."

A motion was made by the defendant for a new trial, which was denied for the reasons stated in the opinion of the court.

Redick & Briggs, for plaintiff.

A. J. Poppleton and B. Wakeley, for defendant.

Before DILLON, Circuit Judge, and DUNDY, District Judge.

DILLON, Circuit Judge. 1. In support of the motion for a new trial, it is urged by the defendant's counsel that the court erred in that portion of the second division, its charge to the jury commencing with, "But I draw this distinction," and ending with the words, "for, in such a case, they are not, in any proper sense, 'fellow servants' in the same common service." I fully appreciate the difficulties that surround the question here presented, and I do not feel certain that this particular case can be discriminated from those in which it is held that the common employer of two servants is not liable to one for the act or negligence of the other in the course of the common employment.

Considering, however, the peculiarities of the case,—the tender age and inexperience of the servant injured, the specially hazardous, extraordinary service which was demanded of him, and that the superior servant, who ordered the boy to perform it, was in the course of his proper duties, and that the injury resulted directly from his negligent and wrongful command, I do not think that it justly falls within the principle which disentitles a servant to recover from the master for an injury caused by the negligence of a co-servant in the same common service. At all events, it is my clear and fixed conviction, that, upon reason, principle and public policy, the employer ought to be, in such a case as the present, responsible civilly for the act of the servant whose neglect and wrongful conduct caused the injury. I do not intend to elaborate my views, nor enter upon a discussion of the authorities. I am aware of the great extent to which the general rule has been carried by the courts—particularly by the courts of England. I place my judgment upon this ground: Collett, in superintending the repair of the belt attached to the machinery, was in the discharge of a duty entrusted to him by the corporation, and in the performance of that duty he, and he alone, at that time, represented the corporation, which, in contemplation of law, was there present in his person, and when he ordered, without due and reasonable care and reflection, the boy to perform a service attended with so much danger, and one which involved a risk not within his ordinary duties and employment, the company ought to be held liable for the wrong the same as if, under the like circumstances, the same act had been required of the boy by an individual employer. True, Collett was a servant of the company, but so was Ballou the general foreman of the shop, and so was Gamble the superintendent, and so are all the other officers of the corporation in the long line of gradation from the president to the lowest. If the company is not responsible for the wrongful act of Collett, it would not be had the same act been done by the foreman of the shop, by the superintendent of the car department, or even by the president of the company himself. Here was dangerous machinery in operation; here was a service, dangerous in its nature, to be performed. Public policy requires that the master, where the safety of a person of tender years and inexperience is concerned, if, indeed, in any case, should not be able to abdicate his duty, or to shift upon another his liability, and this he is enabled effectually to do if he is not liable for the tortious act and neglect of his own servant, and his only representative in connection with the service which was required of the boy. Without denying the general rule, our conclusion is that it should not be extended to this case.

2. On the trial it was contended by the defendant that the jury could in this action only consider and allow for such damages as had happened when the action was brought, while the plaintiff maintained that the jury might take into consideration all the damages that had been sustained up to the day of trial. On this point the court charged as requested by the plaintiff, and there is little doubt that this was a view sufficiently favorable

to the defendant. It has been held, indeed, that, in proper cases, damages prospective in their nature, but certain to result from the wrongful act, may be considered and allowed, when they do not form the basis of a new action. Wilcox v. Plummer, 4 Pet. [29 U. S.] 172; cases cited, 2 Greenl. Ev. §§ 268a, 268b.

Judgment will be entered upon the verdict for the sum of $3,056.58.

Judgment accordingly.

[NOTE. A bill of exceptions was signed, and the case taken to the supreme court, where the judgment of the circuit court was affirmed; Mr. Justice Davis delivering the opinion, in which it was held that the master's exemption from liability for the negligent conduct of a coemployé in the same service rests upon the theory that the employé, in entering the service of the principal, is presumed to take upon himself risks incident to the undertaking, among which are to be accounted the negligence of fellow servants in the same employment. But, remarked the learned justice, this presumption cannot arise where the risk is not within the contract of service, and the servant had no reason to believe he would have to encounter it. The injury in this case, it seems, did not occur while the boy was doing what his father had engaged he should do. On the contrary, he was at the time engaged in a service outside the contract, and wholly disconnected with it. He was employed as a helper at a moulding machine, or common work hand, on the floor of a shop; and this, in the language of Mr. Justice Davis, is a very different thing from ascending a ladder resting on a shaft, to adjust displaced machinery, when the shaft was revolving at the rate of 175 to 200 revolutions per minute, and at the order of his foreman. Mr. Justice Bradley dissented. Union Pac. R. Co. v. Fort, 17 Wall. (84 U. S.) 553.]

NOTE. As to measure of damages, see Filer v. New York C. & H. R. R. Co., 49 N. Y. 42. in which it was held that successive actions will not lie for the recovery of damages resulting from an injury to the person in consequence of a single wrongful act; but the recovery may include present damages, and such future or prospective damages as it is reasonably certain will necessarily and inevitably result from the injury.

[The case of Hines v. Union Pac. R. Co., which is published as a note in 2 Dill. 269, is here published as Case No. 6,521.]

In England the rule is "conclusively settled that one fellow-servant cannot recover (from the master) for injuries sustained in their common employment from the negligence of a fellow-servant, unless such fellow-servant is shown to be either an unfit or improper person to have been employed for the purpose. Morgan v. Vale of Neath Ry. Co., 5 Best & S. 570 (in exchequer chambers, Id. 736); L. R. 1 Q. B. 149. And this rule is not altered by the fact that the servant to whom the negligence is imputed was a servant of superior authority, whose lawful directions the plaintiff was bound to obey." Per Mellor, J., in

Feltham v. England (1866) L. R. 2 Q. B. 33. " A foreman is a servant as much as the other servants whose

work he superintends." Per Willes, J., in Gallagher v. Piper (1864) 111 E. C. L. 669; Wigmore v. Jay (1850) 5 Welsh., H. & G. 354; Skipp v. Eastern Counties Ry. Co., 9 Welsb., H. & N. 221; Wiggett v. Fox, 11 Welsb., H. & N. 832; Bartonshill Coal Co. v. Reid, 3 Macq. H. L. Cas. 266.

Fellow-Servants—Who are? See, also, Bartonshill Coal Cc. v. Reid, 3 Macq. H. L. Cas. 266; Waller v. Southeastern Ry. Co., 2 Hurl. & C. 102; Gallagher v. Piper, 111 E. C. L. 669; Morgan v. Vale of Neath Ry. Co., 5 Best & S. 570, 736; Feltham v. England, L. R. 2 Q. B. 33; Tunney v. Midland, etc., Ry. Co., L. R. 1 C. P. 291; Lovegrove v. London, etc., Ry. Co., 16 C. B. (N. S.) 669. See Murphy v. Smith, 19 C. B. (N. S.) 361, as to servant being considered as the master's representative in the establishment. All the cases concur in holding that the master is liable for his own personal negligence.

Duty of master to take reasonable precautions for the safety of his servants. Brydon v. Stewart, 2 Macq. H. L. Cas. 30; Paterson v. Wallace. 1 Macq. H. L. Cas. 748.

Responsibility for defective or improper machinery, or absence of proper guards. Jones v. Yeager {Case No. 7,510}. See, also, Weems v. Mathieson. 4 Macq. H. L. Cas. 215; Clarke v. Holmes. 7 Hurl. & N. 937; Tarrant v. Webb, 18 C. B. 797; Searle v. Lindsay. 11 C. B. (N. S.) 429; Watling v. Oastler. L. R. 6 Exch. 73; Roberts v. Smith, 2 Hurl. & N. 213.

Effect of servant's knowledge and voluntary use of the defective machinery, or knowledge of danger. Jones v. Yeager {supra}. See also, Holmes v. Worthington. 2 Fost. & F. 533: Id. 238; Senior v. Ward. 1 El. & El. 385; Griffiths v. Gidlow. 3 Hurl. & N. 648; Assop v. Yates, 2 Hurl. & N. 768.

Contributory negligence on plaintiff's part disentitles him to a recovery; but knowledge of the incompetence or unfitness of the fellow-servant is only evidence on the plaintiff's part to be submitted to the jury. Hoey v. Dublin, etc., Ry. Co., 5 Ir. C. L. 206.

[1] {Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission.}

[2] {Affirmed in 17 Wall. (84 U. S.) 553.}