North Dakota Law Review

Volume 29 | Number 1 Article 13

1953

Trial - Severance and Apportionment of Damages - Inconsistent Verdicts

Everett J. Hammarstrom

the plaintiff in each situation, leaving to the jury the question of whether the plaintiff understood and assumed the risk.

DOUGLAS B. MCCLELLAN

TRIAL — SEVERANCE AND APPORTIONMENT OF DAMAGES — INCONSISTENT VERDICTS. Plaintiff brought an action for false imprisonment and malicious prosecution against defendant Fox and his corporate employer Montgomery Ward & Co. Judgments were entered upon a jury verdict against Fox and the company for $300 and $2,500, respectively, on the charge of false imprisonment. On appeal it was *held* that Plaintiff could not collect both verdicts, but was entitled to elect which verdict should be satisfied. He could not be compelled to accept the lesser verdict. *Aldridge v. Fox*, 108 N.E.2d 139 (Ill. 1952).

This case is one of the most recent examples of a situation which has been the source of much legal discussion.[1] Essentially it concerns the propriety of permitting the apportionment of damages between persons jointly liable for the same wrongful act. When confronted by the problem in an early case, the Supreme Court of Tennessee ably enunciated the judicial thought up to that time.[2] The court said that when an irregular verdict is rendered there are four lines of procedure which may be followed: (1) the verdict may be set aside and a new trial awarded; (2) where the jury finds the amount of the plaintiff's damages and each of the defendants liable in varying amounts, the plaintiff's right to recover the full amount against the guilty parties may be regarded as fixed and the jury's efforts to apportion damages may be regarded as mere surplusage; (3) the plaintiff may elect the best award of damages and enter judgment for this sum against all the defendants found jointly guilty; or (4) the plaintiff may select which defendant he will take judgment against, enter a *nolle prosequi* as to others, and have his judgment against the designated defendant in the amount the jury awarded against him. More recently it has been held in California and Oklahoma that when a several verdict is returned the plaintiff must take the lowest assessment as the measure of damages.[3] Although many decisions still reflect the adoption of one of these procedures,[4] other courts have employed different means in an effort to find a more equitable solution to the problem.[5] The Minnesota court has held that where a jury enters an inconsistent verdict the trial court must send them back to reconsider the case and return a single verdict.[6]

---

1. Notes, 45 Harv. L. Rev. 1230 (1932); 26 Minn. L. Rev. 730, 734 (1942); 45 Harv. L. Rev. 939 (1932); 22 Minn. L. Rev. 569 (1938).
2. Nashville Ry. and Light Co. v. Trawick, 99 S.W. 695 (1907).
3. Aitken v. White, 93 Cal. App.2d 134, 208 P.2d 788 (1949); Whitney v. Tuttle, 178 Okla. 170, 62 P.2d 508 (1936).
4. Bell v. Riley Bus Lines, 57 So.2d 612 (Ala. 1952) (statute required single verdict; new trial awarded after improper assessment of damages); Atherton v. Crandlemire, 140 Me. 28, 33 A.2d 303 (1943); Bakken v. Lewis, 223 Minn. 329, 26 N.W.2d 478 (1947); Ferne v. Chadderton, 363 Pa. 191, 69 A.2d 104 (1949) (where liability rests on doctrine of respondent superior, apportionment of damages is indefensible; new trial awarded).
5. Kelly v. Schneller, 148 Va. 573, 139 S.E. 275 (1927); Zebnik v. Rozmus, 81 N.H. 45, 124 Atl. 460 (1923).
6. Cullen v. City of Minneapolis, 201 Minn. 102, 275 N.W. 414 (1937).

Under similar circumstances a California court held that the trial judge had power to correct the irregularity by entering a single verdict against both defendants.[7] The latter holding has been sanctioned by a New York decision where it was said that the trial court had the power to correct an inconsistent verdict and there was no necessity for a new trial.[8] In a fairly recent case the Illinois court held that a plaintiff might elect from which defendant he would take his damages and then by dismissing the suit as to the other defendant correct any defect in the verdict.[9] This case was not the first time that the problem had been before the Illinois court but the decision handed down was consonant with prior decisions from the same jurisdiction.[10] Earlier local decisions and the holding in the instant case establish the adherence of Illinois courts to the view, seemingly most popular with the courts, which allows a plaintiff to pursue his remedy to judgment against defendants jointly and severally liable and then elect from whom judgment will be satisfied.

The conflict courts have experienced in attempting to attain a reasonable and equitable determination of the problem is reflected by the decisions previously cited.[11] Considerable legal thought has been stimulated among text and legal writers not only on the basic questions in the field [12] but also on the broad scope of the entire problem itself.[13] While there is much precedent for the holding in the instant case,[14] the general acceptance of this mode of settlement has met with recent opposition indicated by many decisions.[15] Upon the return of a several verdict, courts have held it proper procedure to return the verdict to the jury for amendment or correction.[16] In a recent case it was held proper for a trial court to

---

7. Curtis v. San Pedro Transp. Co., 10 Cal. App.2d 547, 52 P.2d 528 (1935) (trial court must make judgment conform to verdict when intention of jury is clear from language of the verdict).

8. Kinsey v. William Spencer & Son Corp., 165 Misc. 143, 300 N.Y.S. 391 (1937) (an erroneous apportionment of damages does not necessitate a new trial).

9. Holtz v. Jahaaske, 312 Ill. App. 623, 38 N.E.2d 973, 975 (1942), "Since the plaintiff might originally have commenced his action against only one, so, after verdict, he may elect to take his damages against either of them; and where several damages are given, the plaintiff may cure the irregularity by entering a nolle prosequi against all except such as he wishes to take judgment against."

10. Eimer v. Miller, 225 Ill. App. 465 (1930) (held proper practice where separate verdict were returned to permit plaintiff to set aside verdict as to one defendant and dismiss action as to him); Lasley v. Crawford, 228 Ill. App. 590, 599 (1923): "Under the law of this State, Plaintiff had the right, if she saw fit, to dismiss the suit against Rolfe after verdict and take judgment on the verdict against the remaining defendant. . . ."

11. Bell v. Riley Bus Lines, 57 So.2d 612 (Ala. 1952) (new trial awarded on assessment of damages); Curtis v. San Pedro Transp. Co., 10 Cal. App.2d 547, 52 P.2d 528 (1925) (liability cannot be segregated and verdict must be for a single sum); Ferne v. Chadderton, 363 Pa. 191, 69 A.2d 104 (1949) (apportionment indefensible; verdict must be against both defendants for a single sum).

12. 25 Calif. L. Rev. 121 (1936); 45 Harv. L. Rev. 939 (1932); 22 Minn. L. Rev. 569 (1938); 76 U. of Pa. L. Rev. 610 (1928).

13. Prosser, Torts §109 (1941); Notes, 45 Harv. L. Rev. 1230 (1932); 26 Minn. L. Rev. 730, 734 (1942).

14. Holtz v. Jahaaske, 312 Ill. App. 623, 38 N.E.2d 973 (1942); Eimer v. Miller, 255 Ill. App. 465 (1930); Nashville Ry. and Light Co. v. Trawick, 99 S.W. 695 (1907).

15. See note 11 *supra*.

16. Aitken v. White, 93 Cal. App.2d 134, 208 P.2d 788 (1949) (jury returned verdict against defendants in varying amounts); Schuman v. Chatman, 184 Okla. 224, 86 P.2d 615 (1938) (irregular verdict received without objection and trial court cured jury's error).

correct a verdict in the presence of the jury.[17] In addition, several legal writers have suggested other solutions as possibly possessing more merit, such as the award of a new trial [18] or the resubmission of the case to the jury.[19]

The plaintiff might have proceeded against either master or servant separately in the present case. Therefore, there seems to be good reason for allowing him to proceed against both parties in the same action and upon receiving judgment make his election as to which defendant should make satisfaction and then permit him to dismiss against the other party. Should judgment go against the master and in favor of the servant or should the damages assessed the master be greater than those assessed the servant, the master is not thereby prejudiced since he has a right of indemnification against the servant.[20]

Concerning the question of punitive damages, which the court held were justifiable in the instant case, there is a wide divergence of opinion. A great many courts hold that a principal is not liable for exemplary damages unless he had knowledge of, ratified, or participated in the wrong.[21] Meanwhile other jurisdictions hold a principal or master liable not only for actual but also for exemplary damages.[22] It is the opinion of one well known authority that no recovery of exemplary damages can be had against a principal unless he expressly authorized the act as it was performed, or approved it, or was grossly negligent in hiring the agent or servant, or in not preventing him from committing the act.[23] The liability of a corporation for the acts of an employee was illustrated in a recent case where it was held that an employee exerting executive power could bind the corporation by his acts done on behalf of the company and the corporation was liable in punitive damages.[24] The law has long been settled in North Dakota that punitive damages cannot be recovered against an employer unless he participated in the wrongful act of the employee, or approved it either before or after its commission.[25]

EVERETT J. HAMMARSTROM

17. Norris v. Richards, 246 S.W.2d 81 (Tenn. 1952) (procedure held proper when no request was made by counsel to have jury retire and reconsider verdict or have jury polled).

18. 45 Harv. L. Rev. 1230 (1932).

19. Note, 26 Minn. L. Rev. 730 (1942); 25 Calif. L. Rev. 121 (1936) (most practical solution is to return verdict with instructions to clarify; new trial awarded on failure to do so).

20. Marshall v. Chapman's Estate, 31 Wash.2d. 137, 195 P.2d 656 (1948); Kinsey v. William Spencer & Son Corp., 165 Misc. 143, 300 N.Y.S. 391 (1937). It is submitted that action by the master would seldom offer satisfaction.

21. *See, e.g.*, Lake Shore & Railway Co. v. Prentice, 147 U.S. 101 (1892) (action against railroad for wrongful act of servant); The Amiable Nancy, 3 Wheat. 546, 558 (U.S. 1818), "They (defendants) are innocent of the demerit of this transaction, having neither directed it, nor countenanced it, nor participated in it . . . they are not bound to the extent of vindictive damages."; Voves v. Great Northern Ry. Co., 26 N.D. 110, 143 N.W. 760 (1913) (state law declared on master's liability for the act of a servant); Gill v. Selling, 125 Ore. 507, 267 Pac. 812 (1928) (physician and patient case).

22. *See, e.g.*, Alexander v. Jones, 29 F.Supp. 690 (E.D. Okla. 1939) (negligence case); Miller v. Blanton, 210 S.W.2d 293 (Ark. 1948) (automobile collision); Schmidt v. Minor, 150 Minn. 200, 184 N.W. 964 (1921) (assault and battery); D.L. Fair Lumber Co. v. Weems, 196 Miss. 201, 16 So.2d 770 (1944) (employer-employee case).

23. Sedgwick, Damages §378 (1913).

24. District Motor Co., v. Rodill, 88 A.2d 489 (D.C. 1952) (intent of employee imputed to corporation).

25. Rickbeil v. Grafton Deaconess Hospital, 74 N.D. 525, 23 N.W.2d 247 (1946); Voves v. Great Northern Ry. Co., 26 N.D. 110, 143 N.W. 760 (1913).