North Dakota Law Review

Volume 24 | Number 1 Article 5

1948

Negligence - Carriers - Contributory Negligence of Carrier Imputed to Fully Paid Shipper Suing as Real Party in Interest

Maurice E. Garrison

CASE NOTES

NEGLIGENCE—CARRIERS—CONTRIBUTORY NEGLIGENCE OF CARRIER IMPUTED TO FULLY PAID SHIPPER SUING AS REAL PARTY IN INTEREST. Plaintiff-shipper brought this action to recover damages to a shipment of goods sustained in an automobile collision of the defendant and a common carrier. The carrier had already paid the shipper for the entire loss in accordance with certain statutory requirements. The trial court sustained the defendant's motion for a directed verdict solely on the ground that since the plaintiff had been fully compensated it was not the real party in interest. On appeal, *held*, one justice dissenting, that the judgment be reversed. Since the payment received from the carrier is "from a source wholly independent from the wrongdoer" and since the more just rule would allow the defense of contributory negligence of the shipper to be interposed, there is no objection to allowing suit by the plaintiff-shipper as the real party in interest. *Annheuser-Busch Inc., v. Starley*, 28 Cal. 2d 347, 170 P. 2d 347 (1946).

Payment by the carrier was presumably made under Cal. Civil Code, sec. 2194 (Deering, 1937). An identical statute is N. D. Rev. Code, sec. 8-0901 (1943). This statute fixes absolute liability on the common carrier for loss or damage to goods occurring during transit and excuses the carrier only if the cause of damage falls within one of the specific exceptions. This added liability is imposed only on common carriers; an ordinary bailee or a private carrier is liable only for its own negligence. Dobie, Bailments and Carriers, 1st Ed., sec. 116; Van Zlie, Bailments and Carriers, 1st Ed., sec. 467; Elliot on Railroads, Vol. 4, 2nd Ed., sec. 1454. The result is some confusion in the cases as to the legal nature of this added liability of the common carrier for goods in its possession. Some courts have classed this liability as that of an insurer, *Inland Waterways Corp. v. Hallett and Carey Co.*, 52 F. 2d 13 (C.C.A. 8th 1931); *Duncan v. Great Northern Rwy. Co.*, 17 N.D. 610, 118 N.W. 826, 19 L.R.A. 952 (1908). But Cf. *Harris v. Parkwood*, 3 Taunton 264 (Eng. 1810); *Hall and Long v. The Railroad Companies*, 13 Wall. 367, 20 L. Ed. 594 (U. S. 1871). Other cases hold the carrier to be the agent of the shipper, *Arctic Fire Ins. Co. v. Austin*, 69 N.Y. 470, 25 Am. Rep. 221 (1827); *Simpson v. Hand*, 6 Wart, 311 (Pa. 1841). See Comments, 38 Harv. L. Rev. 28 (1924); 15 Col. L. Rev. 399 (1915). The court in the instant case cites *Bower v. Union Pacific R. R.*, 106 Kan. 404, 188 P. 420 (1920), which found that "common carriers of goods are bailees; because of the extraordinary liability imposed upon them, they are classed as extraordinary bailees." This added liability of the common carrier has been used by some of the courts to find a distinction between a common carrier and an ordinary bailee, *Spelman v. Delano*, 177 Mo. App. 28, 163 S. W. 300 (1913); *Fischer v. International R. R.*, 112 Misc. 212, 182 N. Y. Supp. 313 (1920). There is a distinction as to the extent of the liability since only the common carrier has imposed upon it this added stringent liability; but since the early leading case of *Coggs v. Bernard*, 2 Ld. Raym. 909 (1703) this added liability has been imposed because of public policy and not as an alteration of the fundamental bailment relationship of the carrier and shipper. If the shipper accompanies the goods while in the possession of the common carrier, this added liability does not attach, *Atlantic Fruit Co. v. Pennsylvania R.R. Co.*, 149 Md. 1, 130 Atl. 63 (1925); *Nennelee v. St. Louis I. M. & S. R. R. Co.*, 145 Mo. App. 17, 129 S. W. 762 (1910), which indicates that unless there is a true bailment with the relinquishing of possession, control and custody of the goods throughout the entire time of shipment the carrier is liable only for its own negligence. Comment, 28 Iowa L. Rev. 130 (1942). In the law of bailments it is fundamental that either the bailee or the bailor may sue a third party for any injury to the goods bailed; and a full recovery by either is a bar to a subsequent action by the other. If the bailee sues, his contributory negligence can, of course, be interposed as a valid defence of the third party. In an action by the bailor, however, the accepted rule does not impute the negligence of the bailee to the bailor. Dobie, Bailments and Carriers, 1st Ed. sec. 28. Although a few early cases allow the negligence of the carrier to

be imputed to the shipper where the shipper sues a third party tortfeasor, *Vanderplank v. Miller*, 1 Moody and Malkin 169 (1828); *Duggins v. Watson*, 15 Ark. 118, 60 Am. Dec. 560 (1854), the only modern authorities found hold in accord with the bailee-bailor situation that contributory negligence may not be imputed. *Bower v. Union Pacific R. R.*, 106 Kan. 404, 188 P. 420 (1920); Cf. *Henderson v. Chicago Railways Co.*, 170 Ill. App. 616 (1912). Despite this, the court in the instant case felt a distinction was justified because of the prior payment by the carrier under the statute and professed to ". . . believe the more just rule to be that contributory negligence of the carrier is a defense." Historically, there is nothing to indicate that the question of imputing negligence depends on the allocation of loss between the bailee and the third party. As is briefly summarized in Comment, 78 U. Pa. L. Rev. 1009 (1930), the earlier view of allowing the defense of contributory negligence was a logical outgrowth of the common law. Originally, the bailee, being in possession could maintain an action and he in turn was strictly accountable to the bailor. A corresponding doctrine held the bailor liable for any injuries caused by his bailees. When the bailor was later given the right to sue if the bailee had not sued, the courts were quick to accept the doctrine first enunciated in *Herlihy v. Smith*, 116 Mass. 265 (1874), that a bailor was not liable for injuries to a third party due to the negligence of his bailee; the basis of this doctrine is the lack of control by the bailor over the bailee. Once suits by the bailor were permitted, a parallel development of the law was that contributory negligence of the bailee would bar recovery of the bailor. This doctrine was first repudiated in *New York, L E. & W. R. Co. v. New Jersey Electric R. R. Co.*, 60 N.J.L. 338, 38 Atl. 828 (1897) and was the beginning of the present rule that the negligence of the bailee was not a bar to an action by the bailor, against a third party. It is thus indicated that the decay of the doctrine of imputed negligence resulted from a dislike of ownership per se being the basis of liability. The court to reach its conclusion in the instant case turned the clock back historically to revive the concept of imputed negligence which has disappeared in the bailor-bailee situation. There certainly is less justification for such a holding in a carrier-shipper situation, as the goods in question are entirely out of the control of the shipper. In the instant case, the shipper must apparently hold the amount recovered for the benefit of the carrier, and the third party tortfeasor has lost a defense of contributory negligence of the bailee-carrier. This is exactly the situation as to allocation of loss in any bailment and has developed as a policy of the courts to protect the innocent bailor rather than one of the wrongdoers. It is suggested in a discussion of the instant case in 34 Cal. L. Rev. 769 (1946) that the court might have protected the third party by simply holding that the shipper was not the real party in interest; however, once the shipper is considered the proper party plaintiff, grafting an exception onto the established doctrine denying imputed negligence hardly seems justified.

MAURICE E. GARRISON
Second Year Law Student

TAXATION — DUE PROCESS — INJUNCTION AGAINST IMPOSITION OF GENERAL TAX FOR MUNICIPAL WATERWORKS WHERE NO SPECIAL BENEFIT TO TAXED CORPORATION. The Morton Salt Co. owns property within the corporate limits of South Hutchinson, Kansas, the assessed valuation of which is approximately 46% of the total assessed value of all the property within the corporate limits. The city issued bonds to finance a municipal waterworks system. Present construction plans bring the system within three-quarters of a mile of the property owned by plaintiff. Additional cost to extend the system to plaintiff's property is above the statutory limit imposed on the city for such improvement. Plaintiff brought suit to invalidate the tax and to secure a preliminary injunction, pending final disposition of the suit to permanently enjoin the city from selling the bonds. On appeal from an order denying injunctive relief it was *held*, one judge dissenting, that the order be reversed. A temporary injunction should be