1889

Liability of a Railroad Corporation to a Servant for Injuries Caused by the Negligence of a Fellow Servant

Fred L. Clock
Cornell Law School

The Liability of a Railroad Corporation to a Servant for injuries caused by the Negligence of a Fellow Servant.

In treating a subject of this kind, which is only a branch of the general law of Negligence, it would be superfluous and perhaps useless to enter into any elaborate discussion as to the general law and liability for Negligence. And so with this very brief introduction, I will proceed, to the best of my ability, to discuss - The Liability of a Railroad Corporation to a Servant for injuries caused by the Negligence of a Fellow Servant.

The first question which presents itself is - What is negligence? There are several definitions given by the various courts and text-writers in the discussion of this subject. Alderson, defined negligence as "the omission to do something which a reasonable man, guided by those principles which ordinarily regulate the conduct of human affairs, would do, or doing something which a pru-

dent and reasonable man would not do."
Wilcox, in the case of Grill v. Iron Screw Col-
lier Co, 1 L.R.C.P. 612, briefly defines it thus —
"Negligence is really the absence of such care
as it was the duty of the defendant to use."
Negligence was defined by Judge Swayne,
in R. R. Co. v. Jones, 95 U.S. Rep. 441, "as the failure
to do what a reasonable and prudent per-
son would ordinarily have done under
the circumstances of the situation, or doing
what such a person, under the existing cir-
cumstances, would not have done."
So the test question in all cases seems
to be — Did the defendant do all that a pru-
dent and careful man would have done
in a like situation? — and if he did so
the party injured cannot recover.
The law of Negligence has been as prolific,
in giving rise to litigation, as any law in
the statute book. Whether it is a case of
cows cattle getting into his neighbor's or —

chard and eating the succulent fruit or whether it is a case of a valuable human life being lost through some mismanagement, the law of negligence will apply. So it can readily be seen that this law covers an immense field of litigation and, while occupying much of the attention of the courts, is also a vast and lucrative source of revenue for the lawyer.

The general rule seems to be, both in England and in this country, that a master is not generally responsible for an injury to his servant suffered through the negligence or wrong-doing of a fellow servant.- Priestley v. Fowler, 3 M. & W. 1, Hutchinson v. York, etc. R.R. Co, 5 Exch. 343, Farwell v. Boston and Worcester R.R. Co, 4 Met. 49, Chapman v. Erie R.R. Co, 55 N.Y. 579, Sherman v. Rochester and Syracuse R.R. Co, 17 N.Y. 153.

The case of Farwell v. Boston and Worcester R.R. Co. is the leading case in this country,

on this subject and was one of the first cases in which the above rule was applied, there having been but two others, at that time, where a servant had attempted to recover from a master, for another servant's carelessness or misconduct.

It appears in this case that the B. and W. R.R. Co. employed the plaintiff to serve them as an engineer, at the same time having in their employment one Whitcomb, whose duty was that of switch tender. No question was raised as to Whitcomb being a competent and trustworthy servant. Through the negligence of Whitcomb, in placing a switch in an improper manner, the engine, on which the plaintiff was serving as an engineer, was derailed and the plaintiff had his hand crushed. In his opinion on this case Chief Justice Shaw says; — "The grievance to be, resulting from consideration as well of justice as of

policy, is, that he who engages in the employment of another, for the performance of specific duties and services, for compensation, takes upon himself the natural and ordinary risks and perils incident to the performance of such service, and in legal presumption, the compensation is adjusted accordingly.

And this would seem to be the better doctrine. The master is not an insurer of the safety of his servant. He employs him to do work that is definite and certain. The servant encounters the dangers and risks arising from such work and demands compensation accordingly. The servant is not obliged to risk his safety in the master's service unless he chooses and may leave at any time when the master fails to perform his obligations. Of course, there is an implied contract, on the part of the master,

that he will use reasonable care in dealing with the servant and a breach of this implied contract would render the master liable. But in the absence of any express contract between the parties, the master is only liable for a breach of such an implied contract— that is to say— the master is only liable for personal negligence. But this applies to the liability of a masters for his own negligence or misconduct. Now let us see what his liability is where a servant is the negligent party. And that leads us to ask— Who are servants? Servants of a railroad corporation are all those employés, of whatever grade, who are engaged in carrying on the business of the corporation. Cooley gives the definition of a servant as— "one who, for a valuable consideration, engages in the service of another, and

undertakes to observe his directions in some lawful business."

But from this it does not necessarily follow that all such are fellow servants.

Who then are fellow servants?

Mr Green lays down the rule, that the term fellow servants includes all who serve the same master, work under the same control, derive authority and compensation from the same source and are engaged in the same general business, though it may be in different grades and departments of it.

Cooley gives a briefer definition by saying - "Persons are fellow servants where they are engaged in the same common pursuit under the same general control."

The general rule seems to be that the master is not usually liable for injuries to a servant caused by the

negligence of a fellow servant but there is still some dispute in regard to how far this rule shall apply. Some courts holding that a servant who was under the control of another, at the time of the injury, and who was entrusted with duties of a higher grade than the one injured, can recover for such injuries if caused by the negligence of the superior servant. Other courts, on the contrary, hold that even in this case the general rule must apply and the servant cannot recover. But a railroad corporation, however, occupies a rather peculiar position in one respect - that is they are not natural beings but are artificial persons created by law and therefor cannot render themselves liable as a natural person could do under the same circumstances.

But it would seem no severe than fair and just that they should be liable to their servants for negligence of their fellow servants where a single master would be liable for the neglect or carelessness of such a servant. If a master is liable for his own negligence, where he has personal supervision over the work or assists personally in it, it seems that the master should be equally liable if the injury to the servant was caused by the negligence of one whom the master had placed in such a position that he can be recognized as the master's representative, and with the power to carry on the business at his own discretion.

Feltham v. England, L. R. 2 Q. B. 33.

Ford v. Fitchburg Railway Co., 110 Mass. 240.

Pantzar v. Tilden Foster Iron Mining Co., 7 N.Y. 369

In the case of Farl v. Fitchburg R. Co, an engineer on one of the company's engines sustained injuries by its explosion. It was urged by the defense, that it was the duty of the company agents to supply such machinery and that such agents and the engineer were fellow servants and hence the plaintiff could not recover. But the court said - "The rule of law, which exempts the master from responsibility to the servant for injuries received from the ordinary risks of his employment, including the negligence of his fellow servants, does not excuse the employer from the exercise of ordinary care in supplying and maintaining suitable instrumentalities for the performance of the work required. One who enters the employment

of another has a right to count on this duty, which must always be discharged, when the employer is a corporation, by officers and agents, does not relieve the corporation from this obligation. The agents who are charged with the duty of supplying safe machinery are not, in the true sense of the word, to be regarded as fellow servants of those who are engaged in operating it. They are charged with the master's duty to his servants. They are employed in distinct and independent departments of service and there is no difficulty in distinguishing them, even when the same person renders service by turns in each, as the convenience of the employer may require. In one the master cannot escape the consequence of the ag-

negligence, if the servant is injured, while in the other he may."

In the case of Pantzar v. Tillie Foster Iron Mining Co. it appears that the defendant was the owner of a coal mine conducted under the management of a superintendent who had full control and discretion in carrying on the work. The plaintiff, who was employed upon the construction of a wall, was injured by the fall of a mass of rocks from an overhanging cliff. It also appears that there was a crack in the cliff which made it dangerous to work beneath it and also that the attention of the superintendent was called to this fact. The plaintiff, however, was not aware of the dangerous condition of the cliff. The court held, "that a master owes the duties he has

servant of furnishing adequate and suitable tools and implements for his use, a safe and proper place in which to work, and, when they are needed, the employment of skillful and competent workmen to direct his labor and assist in the performance of his work. That no one of these duties can be delegated by the master to a servant of any grade so as to exonerate the master from responsibility to another servant who has been injured by its non-performance. Where the general management and control of an industrial enterprise has been entrusted to a superintendent, he stands in the place of the master, and his neglect to adopt reasonable means and precautions to provide for the safety of the employés constitutes an omission of duty, on the part of the

master, rendering him liable for any injury to an employé, resulting therefrom.

But there are cases holding contrary to these, one of which is that of Wilson v. Merry, L.R. 1S. & Div. 326, where it was held that those operating a mine were not liable for the death of a miner from an explosion of fire damp caused by an interruption of the ventilation of the mine, resulting from the manager erecting a scaffolding which prevented such necessary ventilation. Lord Cairns, in rendering an opinion in this case, said: "What the master is, in my opinion, bound to his servants to do, in the event of his not personally superintending and directing the work, is to select proper and competant persons to do so, and to furnish them

with adequate materials and re-
sources for the work. If han he has
done this he has, in my opinion,
done all that he is bound to do.
and if the persons so selected are
guilty of negligence, this is not the
negligence of the master."

And in another case the Chief Justice
took the same view and said - "The
master may be responsible where
he is personally guilty of negligence,
but certainly not where he does his
best to get competant servants. He
is not bound to warrant their com-
petency."

And even in the Farwell case,
before referred to, the court held;
"That where a master uses due dili-
gence in the selection of competant
and trusty servants, and furnishes
them with suitable means to do for

the service in which he employs them, he is not answerable to one of them for an injury received by him in consequence of the carelessness of another, while both are engaged in the same service." What is meant in this case by the term-same service is a question. If it means all those employed by the corporation in the furtherance of its business then the company would not be liable for the negligence of its general manager, but if it means, and it probably does, those engaged in about the same grades of employment, the company would be held responsible to its servants for such manager's negligence.

It seems to be the rule in England, that a corporation cannot be held responsible to its servants for the

negligence of those who act as its representatives. In the United States the rule seems to be that laid down in Malone v. Hathaway, 64 N.Y. 5, which states; "when the servant, by whose acts of negligence, or want of skill, others servants of the common employer have received injury, is the alter ego (stands in place of or substitute for) of the master to whom the employer has left everything, reserving to himself no discretion, then the middle man's negligence is the negligence of the employer, for which the latter is liable, the servant in such a case represents the master and is charged with the master's duty. When the middle man, or superior servant, employs and discharges the subalterns, and the principal withdraws from the

management of the business, or the business is of such a nature that it is necessarily committed to agents, as in the case of corporations, the principal is liable for the neglects and omissions of duty of the one charged with the selection of other servants, in employing and selecting such servants, and in the general conduct of the business committed to his care."

In Flike v. B. and A. R.R. Co., 53 N.Y. 549, it would appear that the test question in such a case is, whether or no the servant was granted the power of hiring and discharging other servants, and if he had such power he is not a fellow servant but represents the company, in other words, he is a vice principal

This, however is not enough. And why not? Because a railroad company, being capable of making any rules it chooses, in regard to the management of its road, might enact that only a certain, single, person should have the right to hire and discharge the servants of the company and if the question depended on this test no other negligence would render the company liable except that of this one single man. So the test, of power to hire and discharge is not sufficient. A more reliable test would seem to be whether or not the servant was granted discretionary power, in conducting the affairs of the railroad, and were the discretionary powers so granted, such powers as are always or usually exercised

by those having the authority or control of the railroad or by some of its specially authorized agents.

From the latter, it appears that any officer having control over the line, or any part of it, and who has a right to employ or discharge other servants is not a fellow servant but is a vice principal. And from this latter test it also appears that engineers, firemen, conductors, brakemen are fellow servants and not representatives of company in the sense to render the company liable for their negligence.

In Morgan v. Railway Co., L.R. 12 C.P. 8, it was held, that a railway company was not liable to a carpenter employed to work at his trade on its line, who was injured by the negligence of its porter in shifting an

engine on its turn table close by the shed on which the carpenters were working. Chief Baron Pollock in his opinion said – If a carpenter's employment is to be distinguished from that of a porter employed by the same company, it will be sought to split up the employés, in every large establishment, into different departments of service altho' the common object of their service, however different, is but the furtherance of the business of the master; yet it might be said, with truth, that no two had a common immediate object."

I have said that a conductor is a fellow servant with an engineer but there seems to be a dispute in regard to it. Such was the contrary holding, in the U.S. court, in the case of Chicago

Milwaukee and St Paul Ry. Co, 112 U.S. 377, where it was held that a locomotive engineer employed by the company and who was injured in a collision caused by the conductor failing to transmit to him the train despatcher's order, directing the two trains to pass each other at a certain switch. A verdict was rendered in favor of the plaintiff and the defendant appealed to the U.S. Supreme Court. In his opinion, Justice Field says - "The conductor of a railroad train, who commands its movements, directs when it shall start, at what stations it shall stop, at what speed it shall run and has the general management of it and control over the persons employed upon it, represents the company." Chief Justice Waite and Justices Miller, Woods and Harlan concurred in this opinion but Justices

Gray, Blatchford, Matthews and Bradley dissented. And seeing the court was so nearly evenly divided it would hardly be proper to say that this question is settled in the U.S. Courts. It would seem that Justice Field stretched his imagination, and it might almost be said showed his ignorance in regard to the management of a railroad when he wrote this opinion. Anyone, of the least human intelligence, knows that a conductor has nothing to do with commanding the movements of a train, or directing when it shall start, or stop, or at what station it shall stop, or at what speed it shall run. The movements of a train are regulated, in absence of statute, by a set of rules of the company. The time table shows when and where the train is to start and to stop and the time given between

two stations must necessarially regulate the speed. The only way the conductor commands such movements is to tell the engineer that a certain time specified by the company has arrived. If the engineer had had a clock in his cab, to tell him when to start and there had been no conductor and the clock had stopped and thus, through not knowing the time, an accident had happened and the engineer had been injured, probably the court would hold the clock a vice principal of the company and its negligence in stopping was the negligence of the company. The rule in Ohio is the same as laid down in the case just referred to, but in New York the rule seems to be different and with all due respects to the courts

holding differently, it is probably the correct view.

Thus in Slater v. Jewett, 85 N.Y. 61, s.c. 39 Am. Rep. 627, it was held, that negligence of a conductor in not giving to the engineer a telegram from the train despatcher and negligence of the operator in not addressing it to each, was the negligence of a fellow servant, where the fireman on another train was injured and the company was not liable. Chief Justice Folger said in this case, "that courts may take judicial notice of the fact that the great railways of the land are managed, in the every-day practical running of them, by over-looking officers at distant places, who use the telegraph wires to keep all the while informed where trains are and

direct their movements from hour to hour." And it was held in Keiser v. Chicago and North Western R.R. Co, 61 Wis. 113, that a conductor is not a representative of the company or vice principal, but that he is a fellow servant with other train hands.

The different courts in this country are at as much variance in regard to a foreman as they are in regard to a conductor, in some cases holding him a vice-principal and in others holding him a fellow servant. The former seems to be the holding in Ohio, Tennessee, Kentucky, North Carolina and Nebraska. On the other hand it is held in New York, Pennsylvania, Maryland, Indiana, Wisconsin, Minnesota, Missouri and Oregon that he is a fellow servant with those under his direction.

In Brick v. Rochester, New York and Pennsylvania R.R. 98 Mich. 212, Brick was one of a gang of workmen employed by the railroad company to repair a track which had been practically abandoned and had fallen into decay. One Thompson was employed by the company as a general foreman of reconstruction and repair. He had charge of the train on which Brick was riding at the time of his death. The train ran off the track at a crossing which through the negligence of the foreman, was not properly taken care of and Brick was killed. This negligence of Thompson was held to be the negligence of a co-employé and the company were not liable. And Judge Miller said - "That while the rule, that it is the duty of the master to provide and maintain for the use of

his employés, suitable machinery and other instrumentalities for the performance of the duties devolving upon them, and when it is the duty of the company to provide a track which is sufficient and suitable for the purpose, and to maintain it in good order, is generally applicable to railroads which are in a state of completion, it must be considered with some qualification in reference to a road which has become dilapidated and out of repair and was in the process of being reconstructed". And it has also been held in New York that a yard master and his assistant are fellow servants although the former had the power to hire and discharge others under his control. Wheeler v. Long Island R. R. Co. 84 N.Y. 77

Also that a telegraph operator and an engineer are fellow servants. Dana v. N.Y. Central & H. R. R. R. Co., 23 Hun 473. A car inspector, whose duty it was to detect and mark defective cars was held a fellow servant with the man employed to uncouple them and send them to the shop, in Gibson v. Northern Central R.R. Co. 22 Hun 289. And in Ross v. N.Y. Central & H R.R.R. Co., 5 Hun 488, a surveyor, employed by the company, was held a fellow servant with a conductor on whose train he was riding, free of charge, from his residence to his place of work. In Russell v. Hudson River R.R. Co. 17 Ny. 134, a gravel shoveler, who was riding on a work train, after his days work, from the gravil pit to his home, free of charge, was killed through the negligence of the engi-

were, and it was held that the company was not liable, the two being fellow servants. In Kennedy v. Manhatten Railway Co, 33 Hun 45-7, one Matthew Kennedy was employed by the defendant, which was a elevated railway company, to signal a contractor who was blasting rocks near a portion of the railroad, and also to signal defendants trains when approaching that point. He was required to climb one of the columns supporting the railway and place himself upon the eastern track, and from there signal the contractor and the approaching train. After signaling a train going south, he discovered a train coming from that direction. To avoid this he attempted to reach a girder to the north of him and just as he stepped

upon it, the train struck him and threw him to the ground and he was killed. In a claim of damages, for negligence, on the part of the company, in not providing a platform for him to stand on in such a case the court held- That the risk, of encountering accidents by trains approaching the place where the deceased was employed, was assumed by him when he voluntarily entered upon the discharge of his duties, and that the company was not bound to protect him against it. Judge Daniels also said- "That the immediate cause of this accident was not the exposed situation in which he was placed, but it was the careless, inattentive and improper manner in which the train from the south was

brought upon him. That was the misconduct of the engineer, who was his fellow servant, engaged in the same general employment, for which no redress can be secured against his employer."

We have seen that a master is liable, to a servant, for injuries resulting from his own negligence, or from the negligence of the one representing him. Such liability may be from supplying defective machinery, or from employing incompetent servants. But to render the master liable, for defective machinery, it must be shown that the master or his representative knew of such defects when such machinery was supplied or that they omitted to warn the servant of its defects. There is no warranty that the ma-

machinery is sound, but there is a warranty that due care was used in selecting it.

Columbus and Xenia Ry. Co., v Webb, 12 Ohio St. 475.

And to render a master liable for incompetency of another, it must be shown that the master knew of his incompetency at the time of hiring or afterwards learned such was the case and still retained him in his employment. And it seems that the servant injured must have had no knowledge of such incompetency.

Davis v. D. and M. Ry. Co., 20 Mich. 105.

In Gilman v. Eastern Ry. Co., 10 Allen 233, it was held that if the defendants knew that a switchman, which they employed, was an habitual drunkard, and the

plaintiff, without such knowledge, was injured by the negligence of such switchman, in leaving his switch open, the company was liable.

Contributory negligence, on the part of the one injured, will bar recovery, but I do not propose to treat of that here, as it is a subject foreign to the one under discussion. However, I wish to call attention to the case of Lyon v. Port Henry Iron Ore Co., 24 Weekly Digest 15, in which it was held that the negligence of a fellow workman, concurring with that of the master is not equivalent to contributory negligence.

And now I have nearly finished. In treating of this subject, I have tried to show, in my feeble

way, the general rules pertaining to it as gleaned from the various text-books and the different decisions of the courts. If I may have added to anyones knowledge in regard to this subject, I shall be somewhat surprised and more than content.