South Carolina Law Review

Volume 16 | Issue 4 Article 8

1964

Abrogation of the Fellow-Servant Doctrine in Municipalities

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TORTS—ABROGATION OF THE FELLOW-SERVANT DOCTRINE IN MUNICIPALITIES—STATUTORY INTERPRETATION

Poniatowski v. City of New York, 14 N.Y.2d 76, 198 N.E.2d 237 (1964)

Appellant, a New York City police officer, was injured while serving as a recorder in a police car. The car was operated by a fellow officer and in pursuit of another vehicle at the time of the collision. The Trial Term rendered a verdict for the plaintiff policeman while the Appellate Division reversed the judgment on the law and dismissed the complaint.[1] HELD: Reversed. The Court of Appeals held that the statute[2] waiving the common law immunity of a municipality from liability for negligence in the operation of its vehicles extended protection to fellow officers as well as to the public. *Poniatowski v. City of New York*, 14 N.Y.2d 76, 198 N.E.2d 237 (1964).

The primary issue is whether or not the New York legislature intended to abrogate the fellow-servant doctrine[3] while waiving the immunity of the city from suit by third parties caused by the negligence of its officers.[4] The applicable portions of the statute maintain:

> Every city . . . shall be liable for the negligence of a person duly appointed by the governing board or body of the municipality . . . to operate a municipality owned vehicle within the state in the discharge of a statutory duty imposed upon the municipality, provided the appointee at the time of the accident or injury was acting in the discharge of his duties and within the scope of his employment. Every such appointee shall, for the purpose of this section, be deemed an employee of the municipality . . . .[5]

1. Poniatowski v. City of New York, 241 N.Y. Supp.2d 770 (App. Div. 1963).
2. N.Y. GEN. MUNICIPAL LAW §§ 50a, 50b.
3. "Unless the parties have made an express contract to the contrary, the general rule at common law and in the absence of statute otherwise providing is that a master is not liable to one servant for injuries caused by the negligence of a fellow servant." 56 C.J.S. *Master and Servant* § 321 (1948). *Accord*, Whisenhunt v. Atlantic Coast Line R.R. Co., 195 S.C. 213, 10 S.E.2d 305 (1940).
4. At common law, police officers were not regarded as municipal employees but rather as municipal agents or servants, thereby relieving the city of liability on the doctrine of respondent superior. Matter of Evans v. Berry, 262 N.Y. 61, 186 N.E. 203 (1933).
5. *Supra* note 2.

A subsequent portion of the statute points out that the city shall be liable and shall assume the liability for the negligence of the operation of the vehicle.

The Appellate Division determined that the relationship of the two officers was that of fellow-servants within the meaning of the fellow-servant rule. The Court of Appeals accepted this determination. Almost all jurisdictions would hold that the status of the officers was that of fellow-servant at common law. The Appellate Division went on to hold that the fellow-servant doctrine constituted a complete defense at common law and that the rule was not abrogated by statute.[6]

One of the dissenting justices argued that the statute did make the city liable and that *Robinson v. City of Albany*[7] had so held. The *Robinson* case held that the fellow-servant doctrine was waived by the statute, but the case was not controlling since it was from an intermediate court.

Another dissenting justice insisted that the plaintiff was contributorily negligent and therefore barred from recovery. This contention is of little weight as the issue is the liability of the city under the statute and not the liability of the officer. The dissent viewed the situation as an attempt to expand the already existing common law fellow-servant doctrine but the issue is whether or not the existing doctrine has been abrogated. The question, however, is the liability of the city under the statutes which deem all such officers as employees of the municipality. Without the statute the city would be immune from suit for negligence at common law on the doctrine of *respondeat superior*.

The Court of Appeals in the instant case held that the statute did waive the defense of the fellow-servant doctrine. In so holding, the court looked into the purpose of the statute and then accordingly construed its meaning towards effecting the intention of the legislature. The court reasoned that the legislative intention was to overcome the hardship visited upon those injured through the negligence of municipal officers who would otherwise be without a remedy. The statute was, therefore, interpreted to mean that only the operator of the vehicle was deemed to be a servant and that passengers remained agents as at common law. The operator and his injured passenger, consequently, would not bear the relationship of fellow-servant to each other. Thus, the

6. *Supra* note 1.
7. 218 N.Y. Supp.2d 421 (App. Div. 1961).

doctrine barring recovery would be made inapplicable under the statute.

The court further contended that they had followed similar reasoning before in allowing policemen to recover from the municipality when injured by fellow officers. In citing *Wiseman v. City of New York*[8] to support this reasoning the court relied on the doctrine of assumption of risk rather than the fellow-servant doctrine.

The court in the instant case emphasized in its decision the inherent injustice of not allowing one to recover for injuries incurred as a result of the negligence of another solely because the other happened to be a fellow servant.

The dissent contended that the majority was avoiding a rule by reviving another that had been superseded. The common law rule of *respondeat superior* which considered a police officer as an agent of the municipality rather than as an employee was abandoned with the waiver of immunity by statute.[9] Since the statutory waiver, municipalities have been held liable for negligence of police officers on a master and servant basis.[10] For such a holding the officers must be considered as employees and, therefore, servants of the municipality thus making the reasoning of the majority clearly erroneous. The dissent further recognized that the fellow-servant rule is antiquated, and should, perhaps, be abolished by the legislature rather than by the judiciary.

Following the maxim that "statutes in derogation of the common law should be strictly construed" the Court of Appeals undoubtedly reached an incorrect decision in extending the statutory relief granted to private persons to fellow officers as well. The Court in an attempt to circumvent a harsh common law rule used liberal statutory interpretation to effect justice. The problem had been before the court previously but had been avoided. In *City of Albany v. Standard Ins. Co.*[11] the Court of Appeals was faced with almost identical facts with the exception that the liability of an insurer, whose policy was to save the city harmless from the negligence of its employees, was in issue. The court evaded the question of the liability of the city and decided the case on the basis of the intention of the contracting parties. The *Robinson* case[12] arose from the same occur-

8. 10 N.Y.2d 952, 224 N.Y.S.2d 275, 180 N.E.2d 57 (1961).
9. N.Y. COURT OF CLAIMS ACT § 8.
10. Wilkes v. City of New York, 308 N.Y. 726, 124 N.E.2d 338 (1955).
11. 7 N.Y.2d 422, 198 N.Y.S.2d 303, 165 N.E.2d 869 (1960).
12. *Supra* note 7.

rence and the city was held to be liable to the injured fellow servant by the Appellate Division.

Certain areas of the law must change as society changes. The law of torts is perhaps the area of the law most susceptible to judicial change through decisions. Other areas of the law, such as the law of contracts and the law of real property, require strict adherence to the rule of *stare decisis* in order to promote security and justice. The fellow-servant doctrine has long been recognized as harsh and has been recognized by some as "wicked".[13] One court described the rule as resulting in "gross injustice" and as "callous to human rights".[14] In order to ameliorate some of the rigors of the harsh doctrine, constitutional provisions have abrogated or modified the common law fellow-servant doctrine in many jurisdictions. These modifications are usually in the more hazardous occupations and the validity of these statutes have been upheld by the courts.[15] While statutes of this character are in derogation of the common law and, therefore, not to be extended by implication,[16] it has been held that they should be liberally construed to effect the purposes for which they were enacted.[17] The underlying policy of such provisions is to stimulate employers to exercise greater care for the safety of employees.

In view of the foregoing statutory modifications of the fellow-servant doctrine and the rule of statutory construction that such statutes should be liberally construed to effect the purposes for which they were enacted as enunciated in *Jamison v. Encarnacion*,[18] the decision of the Court of Appeals extending recovery to fellow servants could easily be justified as being the legislative purpose embodied in the statute.

The decision in the instant case should definitely influence the South Carolina law on the point. The South Carolina Constitution abrogated the rigors of the common law fellow-servant doctrine with respect to railroads and clearly provided for future extension of the statute to other areas of employment. The applicable section of the Constitution states:

> Every employee of any railroad corporation shall have the same rights and remedies for any injury suffered by

13. PROSSER, TORTS § 68 (2d ed. 1955).
14. Crenshaw Bros. Produce Co. v. Harper, 142 Fla. 27, 194 So. 353 (1940).
15. Phillips Petroleum Co. v. Jenkins, 297 U.S. 629 (1936).
16. Gray v. Wabash Ry. Co., 157 Mo. 92, 137 S.W. 324 (1911).
17. Jamison v. Encarnacion, 281 U.S. 635 (1930).
18. *Ibid.*

> him from the acts or omissions of said corporation or its employees as are allowed by law to other persons not employees .... The General Assembly may extend the remedies herein provided for to any other class of employees.[19]

The sole purpose and effect of the constitutional section is to limit the defense of the negligence of the fellow servant[20] in conjunction with the abolition of the defense of assumption of risk.[21] It should be noted that this section does not violate the Federal Constitution.[22]

The General Assembly of South Carolina followed the constitutional tempor and extended the section to abrogate the common law immunity of municipal corporations from liability for injuries caused by the negligent operation of vehicles under its control.

> Any person suffering bodily injuries . . . by reason of the careless or negligent management or operation of any motor vehicle under the control of any municipal corporation, engaged in the business of such corporation, may recover in any action against such corporation such actual damages, not exceeding four thousand dollars, sustained by reason thereof . . . .[23]

The language of the statute at first glance would appear to include fellow servants within the words, "Any person suffering bodily injuries". The Supreme Court of the United States construed such an expression in *Randall v. Baltimore & Ohio R.R. Co.*[24] to the effect that the common law rule of the immunity of the master from liability for the negligence of the fellow servants was not abrogated. However, the Supreme Court in a later case handed down the rule that such statutes in derogation of the common law should be liberally construed to effect the purpose for which they were enacted while withholding extension by implication.[25]

If the factual situation of the instant case were to arise in South Carolina the writer feels that the decision of the case

19. S.C. CONST. art. 9, § 15 (1895).
20. Johnson v. Charleston & Savannah Ry., 55 S.C. 152, 32 S.E. 2 (1898).
21. Youngblood v. South Carolina & Georgia R.R., 60 S.C. 9, 38 S.E. 232 (1900).
22. Drennan v. Southern Ry., 91 S.C. 507, 75 S.E. 45 (1912).
23. S.C. CODE ANN. § 47-71 (1962).
24. 109 U.S. 478 (1883).
25. Jamison v. Encarnacion, 281 U.S. 635 (1930).

would be followed in holding that the common law fellow-servant doctrine had been abrogated by statute.

The South Carolina Court has consistently adhered to a strict doctrine of *stare decisis* while remaining adamant to policy consideration conflicting to the contrary.[26] The Court recently reiterated its position in 1962 with regard to the doctrine in *Page v. Winter*[27] by holding the Court could not repudiate the common law rule of not allowing a wife to maintain an action for loss of consortium even though the Court thought the rule illogical and undesirable.

The South Carolina Court has firmer ground for effecting the same result as that reached by the New York Court in the instant case. A comparison of the New York statute[28] with the South Carolina statute[29] reveals that the South Carolina statute is more emphatic toward absolute abrogation of the defense of the fellow-servant doctrine. *A fortiori*, the same result should be reached without violation of the rule of strict adherence to *stare decisis*.

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26. "But it is said it would be impolite to make defendants liable for any injury occuring to firemen from the negligence of the engineer. This would be worth inquiring into with great care in the legislature, but in a court I think we have nothing to do with the policy of a case, the law of it is our guide." Murray v. South Carolina R.R., 1 McMul. 385, 406 (S.C. 1841).
27. 240 S.C. 516, 126 S.E.2d 570 (1962).
28. N.Y. GEN. MUNICIPAL LAW §§ 50a, 50b.
29. S.C. CODE ANN. § 47-71 (1962).