

**S.D. MARTINEZ AND HIS WIFE, CARMEN ONG DE MARTINEZ,
PLAINTIFFS AND APPELLEES, VS. WILLIAM VAN BUSKIRK,
DEFENDANT AND APPELLANT.**

G.R. No. 5691. December 27, 1910

Ponente: MORELAND, J.

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MORELAND, J.:

The facts as found by the trial court are undisputed by either party in this case. They are—

"That on the 11th day of September, 1908, the plaintiff, Carmen Ong de Martinez, was riding in a carromata on Calle Real, district of Ermita, city of Manila, P. I., along the left-hand side of the street as she was going, when a delivery wagon belonging to the defendant used for the purpose of transportation of fodder by the defendant, and to which was attached a pair of horses, came along the street in the opposite direction to that in which said plaintiff was proceeding, and that thereupon the driver of said plaintiff's carromata, observing that the delivery wagon of the defendant was coming at great speed, crowded close to the sidewalk on the left-hand side of the street and stopped, in order to give defendant's delivery wagon an opportunity to pass by, but that instead of passing by the defendant's wagon and horses ran into the carromata occupied by said plaintiff with her child and overturned it, severely wounding said plaintiff by making a serious cut upon her head, and also injuring the carromata itself and the harness upon the horse which was drawing it.

"These facts are not disputed, but the defendant presented evidence to the effect that the cochero, who was driving his delivery wagon at the time the accident occurred, was a good servant and was considered a safe and reliable cochero; that the delivery wagon had been sent to deliver some forage at Paco Livery Stable on Calle Herran, and that for the purpose of delivery thereof the cochero driving the team as defendant's employee tied the driving lines of the horses to the front end of the delivery wagon and then went back inside of the wagon for the purpose of unloading the forage to be delivered; that while unloading the forage and in the act of carrying some of it out, another vehicle drove by, the driver of which cracked a whip and made some other noises, which frightened the horses attached to the delivery wagon and they ran away, and the driver was thrown from the inside of the wagon out through the rear upon the ground and was unable to stop the horses; that the horses then ran up Calle Herran to Calle Real, which they turned up and on which street they came into collision with the carromata in which the plaintiff, Carmen Ong de Martinez, was riding."

The defendant himself was not with the vehicle on the day in question.

Upon these facts the court below found the defendant guilty of negligence and gave judgment against him for P442.50, with interest thereon at the rate of 6 per cent per annum from the 17th day of October, 1908, and for the costs of the action. The case is before us on an appeal from that judgment.

There is no general law of negligence in the Philippine Islands except that embodied in the Civil Code. The provisions of that code pertinent to this case are—

"Art. 1902. A person who by an act or omission causes damage to another when there is fault or negligence shall be obliged to repair the damage so done.

"Art. 1903. The obligation imposed by the preceding article is demandable, not only for personal acts and omissions, but also for those of the persons for whom they should be responsible.

"The father, and on his death or incapacity the mother, is liable for the damages caused by the minors who live with them.

"Guardians are liable for the damages caused by minors or incapacitated persons who are under their authority and live with them.

"Owners or directors of an establishment or enterprise are equally liable for the damages caused by their employees in the service of the branches in which the latter may be employed or on account of their duties.

"The State is liable in this sense when it acts through a special agent, but not when the damages should have been caused by the official to whom properly it pertained to do the act performed, in which case the provisions of the preceding article shall be applicable.

"Finally, masters or directors of arts and trades are liable for the damages caused by their pupils or apprentices while they are under their custody.

"The liability referred to in this article shall cease when the persons mentioned therein prove that they employed all the diligence of a good father of a family to avoid the damage."

Passing the question whether or not an employer who has furnished a gentle and tractable team and a trusty and capable driver is, under the last paragraph of the above provisions, liable for the negligence of such driver in handling the team, we are of the opinion that the judgment must be reversed upon the ground that the evidence does not disclose that the cochero was negligent.

While the law relating to negligence in this jurisdiction may possibly be somewhat different from that in Anglo-Saxon countries, a question we do not now discuss, the rules under which the fact of negligence is determined are, nevertheless, generally the same. That is to say, while the law designating the person responsible for a negligent act may not be the same here as in many jurisdictions, the law determining what is a negligent act is the same here, generally speaking, as elsewhere. (Supreme court of Spain, 4 December, 1903; 16 May, 1893; 27 June, 1894; 9 April, 1896; 14 March, 1901; 2 March, 1904; 7 February, 1905; 16 June, 1905; 23 June, 1905; 13 April, 1903; 7 March, 1902; 12 June> 1900; 2 March, 1907; 18 March, 1898; 3 June, 1901.)

It appears from the undisputed evidence that the horses which caused the damage were gentle and tractable; that the cochero was experienced and capable; that he had driven one of the horses several years and the other five or six months; that he had been in the habit, during all that time, of leaving them in the condition in which they were left on the day of the accident; that they had never run away up to that time and there had been, therefore, no accident due to such practice; that to leave the horses and assist in unloading the merchandise in the manner described on the day of the accident was the custom of all cocheros who delivered merchandise of the character of that which was being delivered by the cochero of the defendant on the day in question, which custom was sanctioned by their employers.

In our judgment, the cochero of the defendant was not negligent in leaving the horses in the manner described by the evidence in this case, either under Spanish or American jurisprudence. (Lynch vs. Nurdin, 1 Q. B., 422; Rumsey vs. Nelson, 58 Vt., 590; Drake vs. Mount, 33 N. J. L., 442; Hoboken Land and Improvement Co. vs. Lally, 48 N. J. L., 604; Wasmer vs. D. L. & W. R. R. Co., 80 N. Y., 212.)

In the case of *Hayman vs. Hewitt* (Peake N. P. Cas., pt. 2, p. 170), Lord Kenyon said:

"He was performing his duty while removing the goods into the house, and, if every person who suffered! a cart to remain in the street while he took goods out of it was obliged to employ another to look after the horses, it would be impossible for the business of the metropolis to go on."

In the case of *Griggs vs. Fleckenstein* (14 Minn., 81), the court said:

"The degree of care required of the plaintiff, or those in charge of his horse, at the time of the injury, is that which would be exercised by a person of ordinary care and prudence under like circumstances. It can not be said that the fact of leaving the horse unhitched is in itself negligence. Whether it is negligence to leave a horse unhitched must depend upon the disposition of the horse; whether he was under the observation and control of some person all the time, and many other circumstances; and is a question to be determined by the jury from the facts of each case."

In the case of *Belles vs. Kellner* (67 N. J. L., 255), it was held that it was error on the part of the trial court to refuse to charge that "it is not negligence for the driver of a quiet, gentle horse to leave him unhitched and otherwise unattended on the side of a public highway while the driver is upon the sidewalk loading goods on the wagon."

The said court closed its opinion with these words :

"There was evidence which could have fully justified the jury in finding that the horse was quiet and gentle, and that the driver was upon the sidewalk loading goods on the wagon, at the time of the alleged injury, and that the horse had been used for years in that way without accident. The refusal of the trial court to charge as requested left the jury free to find a verdict against the defendant, although the jury was convinced that these facts were proven."

In the case of *Southworth vs. Ry. Go.* (105 Mass., 342), it was held:

"That evidence that a servant, whom traders employed to deliver goods, upon stopping with his horse and wagon to deliver a parcel at a house from fifty to a hundred rods from a railroad crossing, left the horse unfastened for four or five minutes while he was in the house, knowing that it was not afraid of cars, and having used it for three or four months without ever hitching it or knowing it to start, is not conclusive, as a matter of law, of a want of due care on his part."

The duty, a violation of which is claimed to be negligence in the respect in question, is to exercise reasonable care and prudence. Where reasonable care is employed in doing an act not itself illegal or inherently likely to produce damage to others, there will be no liability, although damage in fact ensues. (*Milwaukee Ry. Co. vs. Arms*, 91 U. S., 489; *Parrott vs. Wells*, 15 Wall., 524; *Brown vs. Kendall*, 6 Cushing, 292; *Jackson Architectural Iron Works vs. Hurlbut*, 158 N. Y., 34; *Westerfield vs. Levis*, 43 La. An., 63; *Niosi vs. Empire Steam Laundry*, 117 Cal., 257.)

The act of defendant's driver in leaving the horses in the manner proved was not unreasonable or imprudent. Acts the performance of which has not proved destructive or injurious and which have, therefore, been acquiesced in by society for so long a time that they have ripened into custom, can not be held to be of themselves unreasonable or imprudent. Indeed the very reason why they have been permitted by society is that they are beneficial rather than prejudicial. Accidents sometimes happen and injuries result from the most ordinary acts of life. But such are not their natural or customary results. To hold that, because such an act once resulted in accident or injury, the actor is necessarily negligent, is to go far. The fact that the doctrine of *res ipsa loquitur* is sometimes successfully invoked in such a case, does not in any sense militate against the reasoning presented. That maxim at most only

creates a prima facie case, and that only in the absence of proof of the circumstances under which the act complained of was performed. It is something invoked in favor of the plaintiff before defendant's case is in. With the presentation of the defendant's case showing the conditions and circumstances under which the injury occurred, the creative reason for the doctrine of *res ipsa loquitur* disappears. This is demonstrated by the case of *Inland and Seaboard Coasting Co. vs. Tolson* (139 U. S., 551), where the court said (p. 554) :

"* * * The whole effect of the instruction in question, as applied to the case before the jury, was that if the steamboat, on a calm day and in smooth water, was thrown with such force against a wharf properly built, as to tear up some of the planks of the flooring, this would be prima facie evidence of negligence on the part of the defendant's agents in making the landing, unless upon the whole evidence in the case this prima facie evidence was rebutted. As such damage to a wharf is not ordinarily done by a steamboat under control of her officers and carefully managed by them, evidence that such damage was done in this case was prima facie, and, if unexplained, sufficient evidence of negligence on their part, and the jury might properly be so instructed."

There was presented in this case, and by the plaintiffs themselves, not only the fact of the runaway and the accident resulting therefrom, but also the conditions under which the runaway occurred. Those conditions showing of themselves that the defendant's cochero was not negligent in the management of the horses, the prima facie case in plaintiffs' favor, if any, was destroyed as soon as made.

It is a matter of common knowledge as well as proof that it is the universal practice of merchants to deliver merchandise of the kind of that being delivered at the time of the injury, in the manner in which that was then being delivered; and that it is the universal practice to leave the horses in the manner in which they were left at the time of the accident. This is the custom in all cities. It has not been productive of accidents or injuries. The public, finding itself unprejudiced by such practice, has acquiesced for years without objection. Ought the public now, through the courts, without prior objection or notice, to be permitted to reverse the practice of decades and thereby make culpable and guilty one who had every reason and assurance to believe that he was acting under the sanction of the strongest of all civil forces, the customs of a people? We think not.

The judgment is reversed, without special finding as to costs. So ordered.

Arellano, C. J., Mapa, Johnson, Carson, and Trent, JJ., concur.

Torres, J., dissenting: I am of the opinion that the judgment should be affirmed.

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