60 Mass. 292

Supreme Judicial Court of Massachusetts.

GEORGE BROWN

v.

GEORGE K. KENDALL.

October Term, 1850

Fact:

This is an action of trespass, *vi et armis,* brought by George Brown against George K. Kendall, for an assault and battery. The facts set forth in the bill of exceptions preclude the supposition, that the blow, inflicted by the hand of the defendant upon the person of the plaintiff, was intentional. The whole case proceeds on the assumption, that the damage sustained by the plaintiff, from the stick held by the defendant, was inadvertent and unintentional.

The court instructed the jury, that if it was not a necessary act, and the defendant was not in duty bound to part the dogs, but might with propriety interfere or not as he chose, the defendant was responsible for the consequences of the blow, unless it appeared that he was in the exercise of extraordinary care. if the jury believe that the act of interference in the fight was unnecessary, then the burden of proving extraordinary care on the part of the defendant, or want of ordinary care on the part of plaintiff, was on the defendant.

Issue:

1.whether the defendant used stick to separate two dogs and unintentionally damaged the plaintiff comply with standard of ordinary care?
2.whether the defendant has the burden of proving that himself was in the exercise of extraordinary care.

Rule of law:

1. it may be proper to state, that what constitutes ordinary care will vary with the circumstances of cases. In general, it means that kind and degree of care, which prudent and cautious men would use, such as is required by the exigency of the case, and such as is necessary to guard against probable danger. To make an accident, or casualty, or as the law sometimes states it, inevitable accident, it must be such an accident as the defendant could not have avoided by the use of the kind and degree of care necessary to the exigency, and in the circumstances in which he was placed.

2. **Mr. Greenleaf**

''That the plaintiff must come prepared with evidence to show either that the *intention* was unlawful, or that the defendant was *in fault;* for if the injury was unavoidable, and the conduct of the defendant was free from blame, he will not be liable.''

Application:

1. We can have no doubt that the act of the defendant was a lawful and proper, which he might do by proper and safe means. If, then, in doing this act, using due care and all proper precautions necessary to the exigency of the case, to avoid hurt to others, in raising his stick for that purpose, he accidentally hit the plaintiff in his eye, and wounded him, this was the result of pure accident, or was involuntary and unavoidable, and therefore the action would not lie. Or if the defendant was chargeable with some negligence, and if the plaintiff was also chargeable with negligence, we think the plaintiff cannot recover without showing that the damage was caused wholly by the act of the defendant, and that the plaintiff's own negligence did not contribute as an efficient cause to produce it.
2. The directions which the trial court instructed the jury were not conformable to law. If the act of hitting the plaintiff was unintentional, and done in the doing of a lawful act, then the defendant was not liable, unless it was done in the want of exercise of due care adapted to the exigency of the case, and therefore such want of due care became part of the plaintiff's case, and the burden of proof was on the plaintiff to establish it.
3. the burden of proof was on the defendant, was incorrect. Those facts which are essential to enable the plaintiff to recover, he takes the burden of proving. if it appears that the defendant was doing a lawful act, and unintentionally hit and hurt the plaintiff, then unless it also appears to the satisfaction of the jury, that the defendant is chargeable with some fault, negligence, carelessness, or want of prudence, the plaintiff fails to sustain the burden of proof, and is not entitled to recover.

Conclusion: *New trial ordered.*