CASES

DETERMINED BY THE

SUPREME COURT OF CANADA

ON APPEAL

FROM

DOMINION AND PROVINCIAL COURTS

AND FROM

THE SUPREME COURT OF THE NORTH-WEST TERRITORIES AND THE TERRITORIAL COURT OF THE YUKON TERRITORY.

THE MONTREAL PARK AND ISLAND RAILWAY COMPANY (DEFENDANTS) ..... } APPELLANTS;

1905

*March 10,13.

*March 20.

AND

CHARLES McDOUGALL, (PLAINTIFF)..RESPONDENT.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC.

Negligence—Dangerous works—Ordinary precautions—Employer and employee—Knowledge of risk—Contributory negligence—Voluntary exposure to danger.

An employer carrying on hazardous works is obliged to take all reasonable precautions, commensurate with the danger of the employment, for the protection of employees and, where this duty has been neglected, the employer is responsible in damages for injuries sustained by an employee as the direct result of such omission. *Lepitre* v. *The Citizens Light and Power Company* (29 Can. S. C. R. 1) referred to by Nesbitt J.

In such a case it is not sufficient defence to shew that the person injured had knowledge of the risks of his employment but there must be such knowledge shewn as, under the circumstances, leaves no doubt that the risk was voluntarily incurred and this must be found as a fact.

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* PRESENT :— Sedgewick, Girouard, Davies, Nesbitt and Idington JJ.

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APPEAL from the judgment of the Court of King's Bench, appeal side, affirming the judgment of the Superior Court, sitting in review, at the City of Montreal, whereby the judgment of the trial court, Robidoux J., was reversed and the plaintiff's action was maintained with costs.

The appellant company operates an electric tramway in the District of Montreal, in connection with which they have also a telephone system the wires of which are attached to poles which also serve to support electric feed-wires and the trolley by which the tramway is supplied with motive power. The plaintiff was a lineman employed by the company for the purpose of doing work on the telephone wires; he was shewn to have had considerable experience at this kind of work but it did not clearly appear whether or not he had ever worked at it in places where he might be exposed to the greater risks of coming in contact with wires highly charged with electric currents, such as would be necessary for the operation of a tramway. At the time of the accident by which plaintiff's injuries were caused, the company was replacing their old trolley wire by a new one which had not yet been put in place but was attached by tie-wires to the iron brackets on which the trolley in use was suspended in such a manner that it had become charged with high currents of electricity which passed from the new trolley into the brackets rendering them "hot", *i.e.* charging them, likewise, with the same high electric currents. The pole at which the accident occurred had a number of wires attached to it in addition to the feed wire and trolleys; it was crooked and difficult to climb and, in order to strengthen it, was supported by a back-stay or guy-wire wrapped round the pole and fastened to an iron holdfast driven into the ground. This guy-wire was not insulated but, while the pole

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was dry, was not in danger of becoming charged with electricity. The plaintiff, while working upon another pole, had been warned that the brackets were "hot" and told "not to stand on the bracket while he was handling the telephone wires." He was ordered by the foreman to climb the pole where the accident occurred, without further warning, and, in taking hold of the bracket to assist himself, in some way received two electric shocks which caused him to loosen his hold on the pole with one hand which came in contact with the uninsulated guy-wire. He was precipitated to the ground and injured and the theory was advanced that, in thus touching the uninsulated guy-wire, the electric circuit grounded through his body and threw him down. The company had not supplied him with non-conducting gloves, such as are usually supplied to linemen working among highly charged wires.

The plea was to the effect that it was not usual to supply such gloves to employees working on telephone wires with low currents of electricity, that plaintiff was an experienced man aware of the risks of his employment, that he had been warned about the "hot" brackets and that, by disregarding these repeated warnings, he imprudently and voluntarily incurred the danger and was alone responsible for the cause of his injuries.

In the Superior Court, the trial judge, Robidoux J., adopted the views propounded by the defence and dismissed the action, but this judgment was reversed by the Court of Review, on the ground that the company was at fault for neglecting to give the plaintiff the protection to which he was entitled in performing such dangerous work. The Court of Review, however, found that the plaintiff had contributed to the accident and, in accordance with the practice in the Province of Quebec, reduced the damages accordingly to $750.

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On an appeal by the company to the Court of King's Bench, that court affirmed the judgment of the Court of Review, and held that the company had been negligent—

"(1) In not insulating the wires of the back-stay; (2) in not informing the respondent of this fact and of the danger to which he was exposed in climbing a pole like the present one when it could not be ignored how difficult it must have been to avoid touching, at one and the same time, the brackets and the wires at the back-stay, specially when a slip of the spurs (worn for the purpose of climbing poles) or any false move might have rendered that result quite unavoidable."

The court below also said:—

"We must also add that the accident might have been avoided if the company had given respondent the rubber gloves ordinarily used for that kind of work or if the new trolley had been tied up to the bracket with a dry rope."

Meredith K. C. and *Holden* for the appellants.

Brooke K. C. and *Ewing* for the respondent.

SEDGEWICK and GIROUARD JJ. were of the opinion that the appeal should be dismissed with costs for the reasons stated by His Lordship Mr. Justice Davies.

DAVIES J.—I concur in the dismissal of this appeal. It is sufficient that it was clearly established, to my mind, that negligence on the part of the company or its officers was the direct cause of the plaintiff's injuries. They failed to take that reasonable care and provide themselves with those reasonable precautions which it was their duty to take and provide with reference to an employee engaged in the extremely dangerous work of stringing electric wires

along their poles. He was ordered by the foreman to go up one of the poles to attend to some wiring at a time when the ordinary insulation of the bracket connecting the pole with the over-head trolley wire had been destroyed and while the bracket was "hot." He was not supplied with gloves. A guy-wire attached to and supporting the pole was not insulated, and the foreman refused to disconnect the new trolley wire which was being strung from the bracket to which it was attached even for the few moments the plaintiff was working upon the post.

While there is some discrepancy between the witnesses as to the precise warning given to him, the man himself swears that he was only warned "not to stand on the bracket while he was handling the telephone wires." He did not disobey the warning but, apparently, when taking hold of the bracket to assist himself up, an act agreed upon by counsel for the company as not *per se* dangerous, he received a shock which caused him to loosen one of his arms which came in contact with the grounded and uninsulated guy-wire. This contact completed the circuit and he was thrown to the ground and injured. This is the theory of the cause of the accident adopted by the courts below and I accept it, under the evidence, as the true one.

The counsel for the appellant contended that the plaintiff had experience and knowledge of the risk he was running, but, even if he had, which I doubt, such knowledge would not, of itself, absolve the company from liability. It must be such a knowledge as, under the circumstances, leaves no inference open but the one that the workman had voluntarily incurred the risk and that must be found as a fact. The circumstances, in this case, are far from leaving any such inference open and the defence fails.

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Nesbitt J.

NESBITT J.—I think this appeal should be dismissed.

I desire to draw attention to the fact that the headnote of the case of *The Citizens Light and Power Company* v. *Lepitre* (1) is based merely upon an oral opinion of the Chief Justice in that case. That expression was not necessary to the decision of the case which simply proceeded upon the fact that the company had failed to provide ordinary appliances in such a dangerous work. I certainly would not concur, as at present advised, in the expression of opinion by the Chief Justice. I think the doctrine there laid down is only applicable as between a company carrying on such a dangerous employment and third parties.

I do not, myself, see any difference between an employee of an electric company and any other employee, other than that, owing to the extreme hazard of the work, precautions proportionately commensurate with the danger would have to be taken by the employer under the ordinary rule of law requiring reasonable care. The duty is the same in each case; the evidence of the performance of the duty must necessarily vary according to the circumstances.

In this case, the evidence is quite clear that reasonable precautions, such as were ordinarily adopted by other companies, were not taken, and, I think the view as to liability taken by the Court of King's Bench should be adopted.

IDINGTON J.—I agree with the reasons stated by my brother Davies.

Appeal dismissed with costs.

Solicitors for the appellants: *Campbell, Meredith, Macpherson & Hague.*

Solicitor for the respondent: *Cramp & Ewing.*

(1) 29 Can. S. C. R. 1.