

THE CANADIAN ASBESTOS COM- } APPELLANTS; ¹⁹⁰⁵
 PANY (DEFENDANTS) } *Mar. 15, 16.
 *March 20.

AND

LÉOCADIE GIRARD (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE SUPERIOR COURT SITTING IN
 REVIEW AT THE CITY OF QUEBEC.

Mines and mining—Dangerous ways, works, etc.—Inspection of pit—Employer and employee—Negligence—Evidence—Presumptions—Reversal of findings of fact.

While at work in the pit of an asbestos mine the pit foreman was killed by loose rock falling upon him from the wall of the pit. Some time before the accident, after setting off a blast, the wall had been inspected by a competent person, under the personal direction of the pit foreman himself, and the particular spot from which the loose rock fell tested by sounding and prying with a crowbar and judged to be safe. In an action to recover damages the courts below inferred from the evidence that the wall of the pit had been allowed to remain in an unsafe condition, and held the defendants responsible on account of negligence in this respect. On appeal to the Supreme Court of Canada :

Held, reversing the judgment appealed from, Girouard J. dissenting, that, as an inspection had been duly made by competent persons, using their best judgment in the honest discharge of their duty, who reported the wall to be secure, there could be no negligence imputed to the company in that respect, although it afterwards appeared that there had been error in judgment or in the manner in which the inspection was performed.

Held, also, Girouard J. dissenting, that where there is evidence that makes it unnecessary to draw inferences or rely upon presumptions from facts proved the findings of two courts below, which have acted upon such inferences or presumptions, should be reversed.

APPEAL from the judgment of the Superior Court, sitting in review at the City of Quebec, affirming the judgment of the Superior Court, District of Arthabaska, Choquette J., which maintained the plaintiff's action with costs.

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

1905

CANADIAN
ASBESTOS CO.
v.
GIRARD.

The action was brought by the widow of the late Thomas Tremblay, deceased, on her own behalf and as tutrix to her minor children, issue of her marriage with deceased, to recover damages on account of the death of her said husband, occasioned, as alleged, through the negligence of the company, defendants, in failing to provide a safe place for the workmen to carry on the work upon which they were employed by the company in their asbestos mines at Black Lake, in the District of Arthabaska. Deceased was the foreman in charge of the miners engaged in getting asbestos from a pit at the mines, which was about fifty feet in width and of about the same number of feet in depth. The asbestos was got by sinking levels of ten to fifteen feet, from time to time, in such a manner as to leave a bench or step from the walls of which the asbestos and the rock in which it was found were blown off, by blasting, into the shaft and there trimmed by cutting away the rock. Shortly before the accident occurred blasts had been set off in one of the walls and, before taking the workmen down into the shaft again, this wall had been inspected by one Hébert, the steam driller, who was skilled in such work, under the directions of the deceased foreman, in order to ascertain that there were no loose pieces or rock hanging in the wall and liable to fall into the shaft and injure the men working there. The examination was made by letting Hébert down the side of the wall with ropes while he sounded the wall by striking it with a crow-bar to see that it was standing firmly. At one particular place, eight or ten feet above the bottom of the shaft, they observed a piece of rock which excited their suspicions as to its safety and Hébert tried to pry it out with the crow-bar but it remained, as he thought, firmly fixed in position by the rock wall surrounding it. He asked deceased to come down and make further

examination, but deceased replied that if Hébert thought it safe it must be so and, accordingly, ordered the men to go down into the shaft and continue their work, he himself going down with them and setting to work at a point immediately beneath the suspicious place in the wall. After he had been working there for some time, stated at from half an hour to an hour and a half, the rock in some manner became suddenly loosened, fell upon him and killed him. The accident was not seen by the other men working in the pit, but Hébert, who was sitting on the edge of the bench or step, saw the rock falling and gave evidence, on behalf of the plaintiff, as to how the accident had occurred.

1905
CANADIAN
ASBESTOS Co.
v.
GIRARD.

The plaintiff alleged that the defendants were aware that this pit was in a dangerous condition, on account of cracks in the walls, that it had remained so for a long time in spite of complaints and that the defendants had taken no steps to remove the danger. The defence was that the mine was not dangerous, that the mining was carefully conducted, that deceased was an experienced man, that, in the usual discharge of one of his duties as foreman of the pit, he had, after the blasting, made an inspection of the wall and concluded that it was safe.

The trial court judge adopted the contentions of the plaintiff as being sustained by the evidence as to the general condition of the walls, from which it must, in his view, be inferred that the pit or shaft was not being worked with due regard to the safety of the men employed there. This judgment was affirmed, on appeal, by the Court of Review, Cimon J. dissenting.

Stuart K.C. and *Francis McLennan K.C.* for the appellants.

L'flamme and *J. E. Perrault* for the respondent.

1905

CANADIAN
ASBESTOS CO

v.

GIRARD.

Idington J.

The judgment of the majority of the court was delivered by

IDINGTON J.—The respondent seeks to support this judgment on the simple ground that, though Hébert, the witness who saw the accident and knew more than all others as to the immediate causes and conditions leading thereto and was called by the plaintiff to testify, swore he exercised his best judgment and care in respect of the very stone that is in question, yet as it fell without apparent cause within half an hour or an hour and a half after his inspection there is such presumption of neglect on his part as to entitle us to discard his evidence and act upon the presumption. I cannot accede to this. The plaintiff in calling Hébert is supposed by law to put him forward as a credible witness. It is also shown he was a competent man. The factum of the respondent asserts this also. Tremblay, the deceased, had some opportunity to discern from the position of the stone and its general external appearance whether or not the general want of repair alleged to have existed in the mine would likely affect this particular stone and its next neighbours. He acted as if satisfied that there was not in the general condition of things that danger which is now alleged.

There cannot be imputed neglect if competent men exercise their best judgment and honestly discharge their duty even when that best judgment and duty done may turn out to have been mistaken. If there had been no inspection of this stone and Hébert had not given evidence and we were left to draw inferences from the facts given as to the generally dangerous character of the mine and general want of trimming of its walls, we might be driven to rely on presumption or feel inclined not to interfere with those presumptions others had acted upon. But we cannot

on this, which counsel admitted to be all he had to go upon, let that sort of presumption prevail against the direct evidence.

I think the appeal must be allowed with costs.

1905
CANADIAN
ASBESTOS CO.
v.
GIRARD.
Girouard J.

GIROUARD J. (dissenting)—I do not feel inclined to reverse the judgment of the two courts below upon a mere question of fact, as there is some evidence in support of their finding which is pointed out in their judgments.

Appeal allowed with costs.

Solicitors for the appellants: *McLennan & Howard.*

Solicitors for the respondents: *Perrault & Perrault*