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*Feb. 19.

*May 6.

THE CANADA PAINT COMPANY (DEFENDANTS)..... } APPELLANTS;

AND

EMMA TRAINOR (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA (APPEAL SIDE.)

Master and servant—Negligence—Evidence—Probable cause of accident.

Evidence which merely supports a theory propounded as to the probable cause of injuries received through an unexplained accident is insufficient to support a verdict for damages where there is no direct fault or negligence proved against the defendant and the actual cause of the accident is purely a matter of speculation or conjecture.

APPEAL from the judgment of the Court of Queen's Bench for Lower Canada (Appeal Side) affirming the judgment of the Superior Court, District of Montreal, in favour of the plaintiff for damages and costs.

The plaintiff was injured in some extraordinary and unexplained manner by her foot coming in contact with some portion of a printing press at which she was employed in the defendants' establishment and brought an action against her employers claiming damages for the injuries sustained and alleging them

*PRESENT:—Taschereau, Gwynne, Sedgewick, King and Girouard JJ.

to have been caused by the defendants' neglect to take proper precautions to protect their employees against any possibility of accident whilst at work upon the printing press in question. The plaintiff propounded the theory based upon her own evidence that in jumping to her position upon a box, upon which she was obliged to sit when at work, and which was insecurely fixed, she started the machinery by accidently pushing a lever with her knee and in falling thrust her other foot through the open front of the printing press into the machinery whilst in motion, whilst the defence suggested another theory, supported by evidence of the plaintiff's frivolous conduct at her work, that the injuries she received resulted wholly from her own recklessness and imprudence.

Stuart Q.C. and *Francis McLennan* for the appellant.

Robidoux Q.C. for the respondent.

The judgment of the court was delivered by

GWYNNE J.—This is certainly a very singular case and an important one, not only as affecting the plaintiff who in some way or other has suffered an injury which has necessitated the amputation of the tips of two of her toes, but also as regards the character of the evidence necessary to be established in order to charge the defendants with responsibility for the injury. The case presented by the plaintiff in her evidence given upon her own behalf is that she was in the employment of the defendants working a small printing press; that on the morning of the 12th of February, 1896, she had got down from her seat where she had been working the press, for the purpose of putting away some ink, and she stopped the machinery; that shortly afterwards she returned to her seat, and that standing upon the left side of it she put one hand on

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the seat and the other on the table which was in front of the press, upon which she put her paper when at work, on the press and proceeded to make a jump into her seat, when, but how it happened she could not say, she pushed with her left knee the arm or lever by which the press is set in motion and her right foot got injured under the table which was in front of the press, but how or in what part of the press she could not say. All the explanation she could give was that on putting her hand on the seat it *slipped a little*. She gripped the table, and her foot was caught under the table but how or where she could not say. It appears however that she did get up on her seat, for she says that she remained for a few minutes upon it after the accident had happened, but that the pain was so great she came down and sat upon the frame of a window (which appears to have been behind her seat and about four feet distant therefrom); there she took off her shoe and found her shoe and her stocking cut and her foot bleeding. Another young woman who was working in the same room at the time, at the distance of about twenty feet from the plaintiff's seat, neither saw the accident occurring nor knew anything of its occurrence until she saw the plaintiff sitting on the window frame, when she went over to her and saw that she was injured.

Mr. Guyon, inspector of industrial establishments, was called as a witness for plaintiff. He examined the premises the day after the accident. He knew the machine. There are several in use in Montreal. The press he said was a good press, well fitted up in every particular, and furnished with all the protection against accidents known to the present time. He could not understand how the accident could have taken place. The plaintiff's foot, in his opinion, must in some way or other, but how he could not under-

stand, have got into a coupling; that is the only way in which, in his opinion, the foot could have been caught. The couplings are on either side of the machine and two and a half feet apart. They are at the distance of thirty-three inches from the floor, and about ten or twelve inches under the table at which the plaintiff worked, in front of the press and just on a level with her seat; below that point there was no dangerous place whatever, none where the accident could, in his opinion, have occurred, and how her foot could have got there he could not understand; he never had heard of such an accident having occurred before. The plaintiff in performing her work had no occasion to put her foot there. The table in front of the press is about fifteen inches wide and the place where her foot must have caught being only ten or twelve inches under the table and on a level with her seat, she could have had no need of lifting her foot so high. It was, however, he said, much more easy to understand that the accident had occurred while she was sitting on her seat than that it should have occurred while she was getting into it when she would be standing on the floor. He does not think that an accidental blow struck with her knee upon the arm or lever with which the machinery is set in motion could have set it in motion—to do that would require a pressure made with sufficient force to move from sixty to eighty pounds weight, but then to get the right foot into the coupling where it was injured while the left knee was pressing on the lever would, he says, have placed the plaintiff in a very extraordinary position in which she could not have well been without knowing it; a glance at the press, a plan of which was in evidence, will show this.

The coupling in which Mr. Guyon says that the plaintiff's foot must have been caught is just at the rear ex-

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tremity of, and a few inches above, the lever which sets the machinery in motion. Now when the plaintiff proceeded to take her seat when she met with the accident she was standing, she said, on the left side of her seat with one hand, which must have been her right hand, on the seat, and the other, the left, upon the table. She was thus standing between her seat and the handle of the lever with her back to the handle which projected a little from under and in front of the table in front of the press. She then made a jump to reach her seat, which having reached, the accident, according to her, must have occurred while she was in the act of jumping; and if during that period her left knee was pressing on the lever with such force as to set the machinery in motion while her right foot was in the coupling where it was injured, the position in which the plaintiff must have been would seem to be that she must have been pressing upon the lever, not with her left knee only, but with the whole weight of her body as its sole support. That certainly would have been a most extraordinary position for the plaintiff to have got into as incidental to a jump made to reach her seat, but it would be something more than extraordinary that a jump attended with such circumstances, or with any circumstances whatever they may have been which occasioned the injury to the plaintiff, should have terminated in placing her upon her seat, which by her own admission it certainly did. It is not surprising that Mr. Guyon should have been of opinion that it was easier to understand that, and more probable that, the accident must have occurred while the plaintiff was upon her seat rather than when in the act of getting on it. In the former case it would be possible for the plaintiff to have gotten her foot into the coupling, in the latter to all appearance impossible. The plain-

tiff could give no explanation whatever as to how her foot got into the place where it was injured. Mr. Guyon could not understand how the accident could have happened. It was the most extraordinary occurrence he had ever heard of; no like accident had ever occurred to his knowledge. The only evidence upon the point which was offered upon the part of the plaintiff was her own evidence and that of Mr. Guyon, and at the close of the plaintiff's case it was a matter wholly of speculation and conjecture of which no intelligent explanation has been offered as to how the accident did in fact occur and what was its cause. Mr. Guyon said that he had instructed the defendants to put some sort of a lattice in front of the lower part of the press, but he said that no press in Montreal, of which there were several like the one in question, had any such guard as that which he ordered. He did not order this with any view of thereby obviating any apparent or probable danger for he said that the press itself was furnished with all precautions against accident known to the present time, and he said that in no part of the press below the coupling was there any dangerous place. He did not order anything to be put in front of the coupling doubtless because in the ordinary use of the press for the purpose for which it was constructed it was impossible for the foot of any person whilst working at the press to get into that place, and as he could not understand how this accident could have occurred, he could not intelligently set about preventing its occurrence or he more probably rightly judged that there was no necessity of trying to obviate the occurrence of an accident which could not occur in the ordinary and proper use of the press, and which was of such an extraordinary nature that he could not understand how it could have occurred, and which having occurred no intelligent ex-

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planation of its occurrence had been offered. He also directed the defendants to furnish a seat with a back to it, not that such a seat would give any better security than the previous one against the recurrence of such an extraordinary and unexplained accident, but merely that young girls working the press, when tired, might have some support in order to rest themselves.

The defendants called some witnesses who propounded a theory as to the place where the accident might have occurred other than the coupling spoken of by Mr. Guyon. Their evidence may be summarized as follows:—They were of opinion that the plaintiff's foot had not been caught in the coupling. If it had been more than the tip of the toes would have been affected, and if the machinery had been in motion plaintiff's shoe and foot would have been cut clean across whereas the toe of the shoe was merely bent. It was impossible for the accident to have occurred either at the coupling or at any other part of the press unless when the plaintiff was sitting on her seat and then only by her purposely extending her leg and raising her foot to a point in the front part of the press where it had no business to be at the distance of from ten to twelve inches below the table. That as to the plaintiff having set the machinery in motion by a blow or a push with her left knee, this was quite impossible. That in point of fact the mode by which the machinery was set in motion was by a strong *pull* of the handle of the lever and not by a blow or a push upon it at all. Here it may be observed that if the plaintiff had had any intention of going to work at the press when she proceeded to take her seat in the manner described by her, it seems singular that she should not have *pulled* the lever to set the machinery in motion before pro-

ceeding to take her seat. However, according to the theory of the defendants the accident might have occurred without the machinery having been in motion. It appears that the plaintiff was in the constant habit, although frequently cautioned against continuing the practice, of amusing himself when not engaged at her work in rocking herself backwards and forwards on her seat assisting herself so to do by catching the table with her hands. Now in the upper part of a metal guard in the centre front of the press at a point at the distance of from ten to twelve inches below the table there is a small aperture which the right foot of the plaintiff could have reached if her leg had been properly *extended* under the table from her seat, but that was a position which the plaintiff could not be in if engaged in working the press. Now, into this aperture the toe of the plaintiff's right foot, if her leg should have been so extended, might (not easily but still possibly) have been inserted, but not so as to reach the machinery. If then when rocking herself backwards and forwards for her amusement her right leg had been so extended, her right foot might have reached this point and the tips of her toes might have become inserted, and either in the act of being inserted or in the exertion made to extricate the foot, might have received the injury which they did suffer without the machinery having been in motion. Then, as to the seat, instead of its having been as alleged in the statement of claim four feet six inches in height, it was only thirty-three inches high including a plank of three inches in thickness on which it stood. The seat was made of a box open in front with a wooden bar across the opening upon which to rest the feet. There was also at the bottom of the metal guard in the centre front of the press an iron bar for the feet to rest upon. The depth of the box from front

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to rear was just eleven inches and its width the other way two feet. It stood upon a three inch plank which was three feet long by ten and three-quarter inches wide. It was said to have been perfectly safe and that the plaintiff had no occasion whatever to make a jump in order reach the seat in the manner described by her. A young girl who had worked at the press for nine months before the plaintiff worked at it and who is not so tall as the plaintiff found it always quite safe and always got into it by merely touching the table and sliding along the seat; she never had any difficulty in thus seating herself; it was the only mode at all necessary and there is evidence that the plaintiff herself had been repeatedly seen seating herself in precisely the same manner. Upon the whole of this evidence, we are of opinion that it does not warrant a judgment which pronounces the accident to have been caused by the fault and neglect of the defendants. The utmost that the evidence warrants is that the cause of the accident still is, as it was at the close of the plaintiff's case, a matter merely speculative and conjectural, and that there appears more probability in the theory suggested by the defendants than in that propounded on behalf of the plaintiff. The appeal must therefore be allowed and the plaintiff's action dismissed with costs.

Appeal allowed with costs.

Solicitors for the appellant: *Hatton & McLennan.*

Solicitors for the respondent: *Robidoux, Chenevert & Robillard.*