

THE DOMINION IRON AND STEEL } APPELLANTS;
COMPANY (DEFENDANTS)..... }

1904
*Nov. 30,
*Dec. 1.

AND

WILLIAM OLIVER (PLAINTIFF).....RESPONDENT.

1905
*Jan. 31.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Negligence—Employers' Liability Act—Defect in ways, works, &c.—Care in moving cars—Contributory negligence.

O., a workman in the employ of defendant company was directed by a superior to cut sheet iron and to use the rails of the company's railway track for the purpose. The superior offered to assist and the two sat on the track facing each other. O. had his back to two cars standing on the track to which, after they had been working for a time, an engine was attached which backed the cars towards them, and O. not hearing or seeing them in time was run over and had his leg cut off.

Held, that O. did not use reasonable precautions for his own safety in what he knew to be a dangerous situation and could not recover damages for such injury.

Held, also, that the employees engaged in moving the cars were under no obligation to see that there was no person on the track before doing so.

Held per Sedgewick, Nesbitt and Killam JJ. that the want of a place specially provided for cutting the sheet iron was not a defect in the ways, works, &c., of the company within the meaning of sec. 3 (a) of The Employers' Liability Act.

Held per Girouard and Davies JJ., that if it was such defect was not the cause of the injury to O.

APPEAL from the judgment of the Supreme Court of Nova Scotia, affirming the judgment of Mr. Justice Ritchie at the trial, without a jury, by which the plaintiff's action was maintained for \$1,000 damages and costs.

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

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The circumstances of the case and the questions at issue on this appeal are stated in the judgments now reported.

Lovett for the appellants.

Henry for the respondent.

SEDGEWICK J. concurred in the opinion of Mr. Justice Killam.

GIROUARD J. concurred with Mr. Justice Davies.

DAVIES J.—The respondent, Oliver, the plaintiff in this case, was a workman in the employ of the defendant company at the time of the injuries received by him and for which the action is brought. The action is brought under the Employers' Liability Act of Nova Scotia. The plaintiff at the trial recovered a judgment for \$1,000 damages. The learned judge seemed to base his judgment on sub-section c. of section 3 of the statute holding that the plaintiff was injured by the negligence of one McLean in directing a sheet of iron to be cut by plaintiff, in a dangerous place, and that

McLean was in the employment of the defendant company and was a person to whose orders or directions the plaintiff, at the time of the injury, was bound to conform, and did conform, and the injury sustained by the plaintiff resulted from his having so conformed to McLean's directions.

The learned judge went on, however, to express his doubts whether the injury was really caused by the plaintiff having conformed to the directions of McLean within the meaning of the Act as the iron could have been cut on the rail without danger if the engine and cars had not been run over the track. The learned judge expresses his further opinion that there was negligence on the part of those in charge of the train in moving the cars upon the plaintiff in the way they

did, and his judgment may be said to be based, not only upon the ground already stated with doubts under sub-section *c*, of section 3, but also upon sub-section *e*, the negligence of those in charge of the train by which the plaintiff was run over.

On appeal to the Supreme Court of Nova Scotia that court drew the following conclusions from the evidence :

(1.) That McLean was at the time of the accident a person in the service of the company whose orders or directions the plaintiff was bound to conform to, and that the injury resulted from his having so conformed.

(2.) That the injury was due to the defect in the works or plant used in defendant company's business—that is to say—in the neglect or failure to provide proper plant and a reasonably safe place for cutting the sheet iron.

It is obvious of course that the first conclusion could not sustain the judgment because of the absence of the finding of the essential ingredient of negligence on McLean's part which caused the plaintiff's injuries. In the absence of that essential ingredient the judgment may be said to rest upon the second finding and it must be held to mean that the plaintiff's injuries were proximately and directly due to the "defects" referred to and to exclude negligence of the plaintiff himself as a contributory factor.

On appeal to this court the plaintiff relied upon all of the three grounds above referred to contending that the company was liable either because of the defects in their ways, works, plant, etc., or of the negligence of McLean to whose orders he was bound to and did conform, or of the train hands in moving the train.

The facts are stated by the trial judge as follows :

Plaintiff was employed on the coal washing plant as a jigger and according to instructions given him his duty was, when the jig he worked at was idle, to assist the repair men and work under their instructions. Fred. McLean, a mechanical engineer, was one of the repair men on the washing plant. His duty was to have any small repairs made that were necessary from time to time, and in doing so

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to control the work and to direct the men how it was to be done. On the 11th July, 1902, in the afternoon a jig on which the plaintiff was employed was not working, and it became necessary to reline with sheet iron one of the chutes connected with it.

The plaintiff was assisting McLean in doing this. McLean told plaintiff he was not doing right, and he marked out the shape he wanted on a piece of sheet iron and told him to cut it. The ordinary mode of cutting it was by hammer and chisel, and it was customary for the men working there to cut it on the rails of the railway track. Plaintiff took the sheet and attempted to cut it on a plank. McLean came along and said he was not cutting it right and told him to cut it on the track. Plaintiff put it on the track, and McLean said he would cut it, too, and they both sat on the track facing one another and cut the iron on the rail. There were two coal cars on the track not attached to any engine towards which plaintiff had his back a short distance away. While the plaintiff and McLean were so employed an engine with three cars backed up, coupled to the cars standing on the track and backed them on the plaintiff. Neither McLean nor the plaintiff saw or heard the cars moving until it was too late for the plaintiff to get out of the way. He was run over by the cars and one leg cut off.

So far as the plaintiff's injuries may be said to be due to the defects in the ways, works, premises, etc., of the defendant company, I am unable to concur in the reasoning of the court appealed from. The words of the section are :

Where personal injury is caused to any workman (a) *by reason of* any defect in the condition or arrangement of the ways, works, machinery, plant, building or premises connected with, intended for or used in the business of the employer, the workman * * * shall have the same right of compensation and remedies against the employer as if the workman had not been a workman, etc.

The effect of this statute is to take away from the employer the old defence of common employment. This sub-section (a) is merely an enactment or declaration of the principles of the common law.

The workman is placed in the same position with regard to his employer in certain enumerated circumstances as would be held by any person not in the employment but entering the defendant's

property by invitation and suffering injury. But it is only in cases where the injuries are caused to the workman *by reason of defects*, etc., that the statute applies. Can it be reasonably held in this case that the personal injuries suffered by the plaintiff were caused *by reason of the defects* in the works of the defendant company, assuming that such defects existed? Was there that immediate and intimate connection between the alleged "defects" and the injuries of the plaintiff that the latter could be said to have been caused by the former? Were the injuries the direct consequence of the defects in the sense that the latter may be said to be the *causa causans* of the injuries? In all the other four sub-sections of the section under review it is the negligence of a specified and designated person in common employment with the injured person by reason of which the personal injuries are caused which justifies the action and prevents the company from pleading the doctrine of common employment and so escaping from liability. In this sub-section (a) it is the "defects in the ways and works, etc.," which has that effect. But to my mind it is clear that as under the other sub-sections to sustain the action the negligence must be shown to be the *causa causans* of the injury, so in a case under this sub-section (a) the "defect in the ways, works, plant, etc." relied on, must be shown to be the *causa causans* of the injury complained of. There must be such direct necessary and intimate connection between the "negligence" and the "defect" referred to in these sub-sections on the one hand, and the injuries received on the other as justifies the conclusion that the negligence or the defect as the case may be was the *causa causans* of the injury. The negligence or the defects specified in the section must be shown to have caused the injury not in any indirect or remote way but

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directly and proximately. The plaintiff, it is said, went on the railway track to cut the sheet iron because proper facilities were not otherwise provided for him to do so. But that did not of itself or directly or proximately cause his injuries. In fact there cannot be said to be any necessary immediate and intimate connection between the fact of the plaintiff resorting to the railway track to cut the sheet iron and his subsequent injuries. One was a sequence to the other, not a consequence, and there was not any *intimate or necessary* causal connection between them. The injuries were caused proximately by the moving train and not by any alleged defect in the plant or by the negligence of McLean and conforming to his order to cut the sheet iron on the track. If the moving train had not come along when it did neither the alleged defects in the plant nor obedience to the orders given would have caused the injuries plaintiff suffered. If plaintiff's injuries were caused directly and proximately by the moving train, as is of course the case, they can only be said under any legitimate assumption to have been indirectly and remotely caused by the alleged defect in the plant or the order to cut upon the track. The injuries were not caused as required by the statute "by reason of the defects in the plant, etc.", but by reason of the moving train either properly or negligently propelled and of the negligence and carelessness of the plaintiff in sitting down in the exposed and dangerous position he adopted and failing to take proper precautions against being run over. The railway track was a very dangerous place to do the work, and known by the plaintiff to be such. He knew trains were being moved along the track every few minutes and his injuries were caused by his own carelessness, if indeed it might not be called recklessness, in sitting down upon the railway track with his back

to some cars standing on the track a very short distance from him and utterly neglecting to take such prudent and reasonable precautions for his safety as the circumstances I have mentioned obviously called for. Of course under the circumstances I have mentioned and the assumption I have argued the case upon, namely, the defects in the works justifying if not necessitating a resort to the track so as to cut the sheet iron, if the person in charge of the train which ran over the plaintiff had been guilty of negligence in the management of the train the action could be sustained under sub-section (e). But while the trial judge intimates an opinion that there was not sufficient care taken in moving the cars he does so upon the ground that the brakesman who was directing the operation of coupling the cars attached to the moving engine with those cars standing upon the track near to where the plaintiff was sitting should not have signalled to the engineer to go on after the coupling was completed until he had first gone to the rear end of the train from where he would have seen the plaintiff and McLean sitting on the track. I am unable to agree with the learned judge that the failure of the brakesman to do this was any evidence of negligence. He had no suspicion, of course, that any men were sitting on the track behind the end car. He had no reason whatever to expect they would be there. He acted on this occasion as he ordinarily did, getting off the cars attached to the engine and standing at the side opposite to the point where they coupled with those standing on the track, and as soon as the coupling was completed signalling in the usual way to the engine driver to back up. He could not possibly have seen the injured man unless he stooped down and looked under the cars or ran to the end of the last car to view the track before signaling to

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move. He was not bound, in my opinion, to do either one or the other, and his not doing either of them is no evidence of negligence. To lay down as a standard of duty which all men engaged in directing the coupling of cars and the moving of trains would be bound to comply with, that after coupling any cars on to a train the workman, before signaling the train to move, should assure himself that the track ahead was free of people either by going to the end of the last car or in some other way, would be to go far beyond what is reasonable. The bell, it was proved, was kept continuously ringing but for some reason the warning was unheeded by the unfortunate man who was injured and who, from the manner in which he was sitting on the track with his back to the approaching train, could not see it approaching.

The only remaining ground to be considered is the one on which the trial judge, but with doubts, based his judgment, viz., under sub-section (c) by reason of the negligence of McLean to whose orders the plaintiff was bound to conform and did conform, and whose injuries resulted from his having so conformed. The learned judge's doubts were as to the injuries having resulted from conformity to the orders. The judges of the appeal court were silent upon this ground and I think the doubts of the trial judge well founded.

The case of *Wild v. Waygood* (1), is an instructive one as to the proper construction of this sub-section of the Employer's Liability Act. As I read and understand the judgments delivered in that case by the distinguished judges of the Court of Appeal it is essential under this section to prove negligence of the person in the service of the employer to whose orders the workman injured was bound to conform. Such negligence must be the *causa causans* of the injury, and it

(1) [1892] 1 Q. B. 783.

must be shewn in addition that the injury arose not alone from such negligence but also from the injured person having conformed to the order. Lord Herschell says at page 790 :

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The negligence must be proved, and if you prove the negligence, then it is sufficient if, in addition to proving that, you also prove that the injury resulted, not from the negligence alone, but from the negligence and the conforming to the order.

Lindley L.J. says, at page 793 :

The whole, I think, comes to this : that the injury must be the result of negligence of the person giving those orders and of the plaintiff conforming to those orders.

Kay L.J. says, at page 795 :

The injury must be caused by the negligence of that person (the one to whose orders the workman was bound to conform) and must result from the workman at the time of the injury conforming to the order.

And again :

It relates to negligence which has an *intimate connection* with the conforming of the workman to an order given him at the time of the injury and to which he was conforming at the time of the injury.

I am of the opinion under the evidence that McLean was a person in the defendant's employ to whose order at the time and under the circumstances the plaintiff was bound to conform and did conform. But I am unable to discover the negligence of McLean, and the necessary and intimate connection between the injury plaintiff received and such negligence, if any there was, and plaintiff's conformity to the order he received. I have already discussed this point and have concluded that it was the negligence or recklessness of the injured party in cutting the sheet iron at the dangerous place and in the manner and way and under the circumstances he did without taking any of those reasonable and prudent precautions he should have taken which directly caused his injuries and not any negligence of McLean whose orders he had to obey or of the man or

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men in charge of the engine which run over him, or any defects in the ways, works, etc., of the defendant company.

It was of course strenuously contended by the appellant company that the finding of the Appeal Court as to the existence of defects in their plant because of the absence of proper places for the workmen to cut this sheet iron was contrary to the evidence. In the view I took, however, of the direct and proximate cause of the plaintiff's injuries and of the necessity, if there was a defect in the plant, of showing that it was the *causa causans* of the injury I thought it better to deal with the case as if the finding of fact on this point by the court was correct.

Under all the circumstances I am of opinion that the appeal must be allowed with costs.

NESBITT J.—I would allow the appeal with costs in all courts for the reasons stated by my brother Killam.

KILLAM J.—In my opinion no defect in the condition or arrangement of the ways, works, etc., of the company was proved. The steel plates could be cut upon any hard substance conveniently situated for the purpose. There was no necessity for keeping such substances scattered about so that they would always be near at hand wherever the cutting might be required to be done.

I am also of opinion that there was no negligence in the running of the railway cars or in the matter of proper precautions on the part of those moving them. The railway tracks were not provided for use in cutting plates. While some of the men may have seen fit to use them for such a purpose they did so at their own risk, and the train employees were not called upon to be on the look out for those who might happen

to be on the tracks for that or any other purpose. They did not see the plaintiff or know of his presence on the track.

I agree, however, that McLean was a person in the company's employ to whose orders, at the time and under the circumstances, the plaintiff was bound to conform, and that, in using the railway tracks as he was, the plaintiff was conforming to McLean's orders. But I concur with my brother Davies in thinking that the plaintiff was bound to use reasonable precautions for his own safety in what he knew to be a dangerous situation and that his injuries substantially resulted from his failure to do so. In that view he cannot recover.

Appeal allowed with costs.

Solicitor for the appellants: *W. H. Covert.*

Solicitor for the respondent: *J. A. McDonald.*

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