JAMES A. JAMIESON (DEFENDANT).....APPELLANT;

AND

MARY ELIZABETH HARRIS (PLAINTIFF)..... } RESPONDENT.

1905

*Mar. 1, 2.

*Mar. 9.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Negligence—Master and servant—Findings of jury—New trial.

In constructing the bins for an elevator a staging had to be raised as the work progressed by ropes held by men standing on the top until it could be secured by dogs placed underneath. When secured workmen stood on the staging and nailed planks to the sides of the bin. The planks were run along a tramway at the side of the bins by rollers and thrown off to the side of the bin farthest from the tramway. While two men on the top of the bin were holding up the staging until it could be secured, a plank on top of the adjoining pile fell off. In falling it hit the men on top of the bin and they were precipitated to the bottom and one of them killed. In an action by his widow against the contractor for building the elevator twenty-five questions were submitted to the jury and on their answers a verdict was entered for the plaintiff.

Held, Idington J. dissenting, that while the falling of the plank caused the accident there was no finding that the same was due to the negligence of the defendant nor any that the death of deceased was due to negligence for which, under the evidence, defendant was responsible. Therefore, and because many of the questions submitted were irrelevant to the issue and may have confused the jury, there should be a new trial.

APPEAL from a decision of the Supreme Court of New Brunswick maintaining the verdict at the trial in favour of the plaintiff by an equal division of the judges.

The material facts which led to the death of the plaintiff's husband are sufficiently stated in the above head-note and in the judgments given on this appeal.

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

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At the trial twenty-five questions were submitted to the jury which, with their answers thereto, were as follows:

"1. From which load on the tramway did the plank, which struck the deceased, fall,—the load which Humphreys was handling, or the one next to it?

"A. The one next to it, directly over the bin where the men were raising stage.

"2. To what cause do you attribute the falling of the plank?

"A. To Humphreys throwing off plank.

"3. Was the system of appliances used by the defendant for the raising of the staging and holding it securely after being raised a safe and proper system for the purpose, having regard to the work to be accomplished and circumstances?

"A. Yes, after it was secured in place, but not otherwise.

"4. If not a safe and proper system for the purpose, wherein was it defective as to safety?

"A. The possibility of dogs dropping off.

"5. Was it equally as safe and proper as the system shown to be generally used for the like work or purpose in similar erections?

"A. When properly applied.

"6. If not equally as safe and proper as the system shown to be generally used, wherein does its inferiority in respect of safety consist?

"7. Was the defendant guilty of negligence in respect of the system of appliances provided for the raising and holding of the staging after being raised, and if yes, what negligence, and did that negligence cause or contribute to the death of the deceased Harris?

"A. Yes, 5. No, 2.

"8. Should the defendant have provided a supply of extra dogs on the top of the bins, to be available in

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case of any dropping down, as a reasonable precaution for the safety of the stage raisers, and did the omission to provide such supply cause or contribute to the death of the deceased, and if so, how?

"A. Yes, and he should have informed the men of their whereabouts. Yes, 6. No, 1.

"9. Should the defendant have seen that the counter-weights were at all times kept on the dogs, as a necessary part of the appliance for safely raising and securing the stage, and did the omission to do so cause or contribute to the death of the deceased?

"A. Yes, 6. No, 1.

"10. Was the tramway and its connections, as an appliance for distributing the lumber, in all parts essential for the protection and safety precaution for the stage raisers, the same as generally used for like work in building similar erections; or, if not, was there any material difference, affecting the safety of the appliance, and if there was, wherein did such difference consist and how did it affect the safety of the appliance?

"A. Yes.

"11. Assuming the appliances to be all that reasonable precaution for the stage raisers' safety would require, did the method or system of using those appliances protect the stage raisers at the time of the stage raising, that is to say, take all reasonable precaution for their safety?

"A. No.

"12. Would reasonable precaution for the safety of the stage raisers require that in the distribution of the lumber there should be no handing down or throwing of plank from off the tramway opposite or in close proximity to bins where and when stage raising was going on, or not, having regard to the work to be

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accomplished and other existing conditions and circumstances?

"A. Yes.

"13. Would reasonable precaution for the stage raisers' safety while stage raising, permit of the handing down or throwing of lumber from off the tramway opposite or in close proximity to bins where stage raising was going on, the handing down or throwing being to the other side of the tramway from that on which the stage raising was going on, if due care was exercised in the handing down or throwing off, having regard to the work to be accomplished and the existing conditions and circumstances?

"A. No.

"14. Did the defendant employ a sufficient number of men for the proper performance of the work in its various departments or branches? If not, in what respect was he negligent therein, and did such negligence cause or contribute to the death of the deceased Harris; and if so, how?

"A. No—by not having enough men on tramway.

"15. Did the defendant use all reasonable precautions for the protection of the stage raisers? If not, in what respect did he fail to do so?

"A. No. By allowing plank to be thrown off at or near stage raising.

"16. Did the defendant take reasonable care to provide proper appliances, and so to carry on his operations as not to subject those employed by him to unnecessary risk?

"A. No, 6. Yes, 1.

"17. If you answer "no" to the last question, then was the want of reasonable care in not providing proper appliances, or in carrying on his operations, or both? Was it through such want of reasonable care that the

accident occurred to the deceased by which he lost his life?

"A. It was. Yes, 6. No, 1.

"18. Were the several men employed by the defendant in their respective positions, so far as was reasonably necessary, experienced or instructed for the duties they had to perform? If not, in what respect was the defendant negligent therein, and did such negligence cause or contribute to the death of the deceased Harris, and if so, how?

"A. Yes, the men were experienced, but not sufficiently instructed.

"19. Did the defendant personally control and direct the method of using the appliances, to the extent of authorizing the throwing lumber off the tramway opposite or in close proximity to the stage raisers when at work stage raising, and to the other side of the tramway?

"A. Yes.

"20. Did the defendant direct the particular manner of taking the loads off the slings, placing them on the rollers, conveying them to the place of removal from tram, and mode of handing down or throwing off, as it was done; or did he leave the manner of so doing to the men who had the work to do?

"A. Yes.

"21. Was the manner of taking the loads off the slings, placing them on the rollers, conveying them to the place of removal from tram, and mode of handing down or throwing off, safe and proper? If not, in what respect was the manner of so doing unsafe or improper; and did it contribute and if yes, in what way did it contribute, to the death of the deceased Harris?

"A. No—not having men in the distribution.

"22. Were all parts of the work as carried on by the several workmen in their respective positions so carried

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on with the approval and by the direction or authority of the defendant, both as to what they did and the manner of doing their work? If not, in what work and what respect was the approval, direction or authority of the defendant absent?

"A. Yes.

"23. Was due care exercised in receiving the loads from the sling, placing the same on the tramway from which the plank fell on the deceased, transmitting the same to the place of unloading, and in unloading same off the train? If not, in what respect was due care not taken and who omitted to take due care therein; and was such want of due care in any way the cause of the plank falling from the tram?

"A. Can't answer.

"24. Did the defendant so hurry and overwork the men, or any of them, who had the work to do mentioned in the last question, or any part of it, that they could not, or had not time to, perform their work otherwise than as they did?

"A. Yes.

"25. Did the deceased know of the existence of the risk, that is, the danger of accident happening to him in the work he entered upon, as the whole work was carried on, did he appreciate the danger, or have the means of appreciating it, and take upon himself the risk?

"A. No.

"26. What damages do you find by way of fair compensation to the wife of the deceased for the pecuniary loss resulting to her from the death of her husband?

"A. Twelve hundred and fifty dollars. ($1,250.00).

On these findings a verdict was entered for the plaintiff for the damages assessed by the jury. An application to the Supreme Court of New Brunswick

for a new trial was unsuccessful the court being equally divided and the verdict consequently stood.

Pugsley K. C. and *A. G. Blair, jr.*, for the appellant.

Mullin K. C. for the respondent.

The judgment of the majority of the court was delivered by :

NESBITT J.—The majority of the court are of the opinion that a new trial should be granted in this case.

We fully recognize the principle that if the verdict could fairly be supported upon any evidence upon which reasonable men might come to a conclusion in its favour that it should not be set aside because the appellate court did not agree with the conclusions reached. We also fully agree that answers by a jury to questions should be given the fullest possible effect, and, if it is possible to support the same by any reasonable construction, they should be supported. It must, however, be borne in mind that where it is felt there has been a confusion of the issues at the trial and it is doubtful whether the attention of the jury was given to the real point in issue and the questions answered or unanswered because the jury say "can't answer" leave the real question in controversy in doubt and ambiguity, the cause of justice is best promoted by a new trial. Unless the answers given by the jury to the questions as a whole or to one or more of the questions fairly indicate a finding that the death of the workmen was proximately caused by some specific or definite act of negligence for which the defendant is answerable he cannot be held liable. Any number of findings of want of reasonable care in providing or using proper appliances for the work the defendant was engaged in constructing, could not

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justify the court in entering a verdict against the defendant unless there was a direct finding, or it must be irresistibly inferred from the findings made, that this negligence or want of care was the direct and proximate cause of the accident That is the difficulty we find here.

There appears to be no reasonable doubt that it was the falling of the plank which caused the accident. But there is no finding that this falling of the plank was caused by the respondent's negligence, and, although we have subjected the multitudinous and somewhat conflictory findings of the jury to the most searching analysis, we have been unable to conclude as a result that there has been a substantial finding on what seems to us to be the crucial point of the case; in fact we find it impossible in the conflict of actual findings and the confessed inability of the jury to answer question 23, to say that there has been any finding as to the proximate cause of the accident on which a verdict could be entered.

We desire to offer as few observations as possible lest either of the parties might be prejudiced on a new trial. It is necessary, however, to indicate what we think is the real issue between the parties.

The learned trial judge submitted some twenty-five questions many of them of great length and several of them containing distinct inquiries each necessitating an answer. In addition to this a great many of the questions are directed towards allegations of negligence which, in our opinion, have no bearing upon the issue. On the evidence before us it may well be argued that the proximate cause of the accident was the falling of a plank upon the deceased while he was engaged in the act of raising the stage, and that questions as to whether the system of stage raising adopted by the defendant took a somewhat shorter or longer time than the systems

adopted elsewhere, are not pertinent. The peril involved in a plank striking one of those engaged in the operation of raising the stage must exist according to the evidence for a short space of time, no matter what system of stage raising is adopted, and an injustice might be done if, in applying the doctrine of negligence to a case of this sort, the maxim *causa proxima et non remota spectatur* were lost sight of. The negligence, if any, must have consisted, under the circumstances, in the throwing off of planks in the immediate neighbourhood of the men engaged in the act of stage-raising; and the throwing off or falling off of the plank at that particular period of time, if found to be negligence and the direct and immediate cause of the damage, would determine the defendant's liability. No evidence, establishing that if some other method of stage-raising had been adopted, the men at the particular moment when the plank fell might have had the stage-raising completed and thus the fatal accident been avoided, is pertinent. Had the stage-raising a little lower down in the same bin, at an earlier moment, taken even longer, then the men at the particular moment when this plank fell would have been at their ordinary work instead of being engaged in stage-raising.

This is not dissimilar from the class of cases where it is urged that if a train had been going faster it would have been past the spot where the accident occurred and that, therefore, speed is not negligence.

We think that all the questions relating to counterweights and dogs and staging were unnecessary.

The jury have found, in answer to questions 7 and 9, that the defendant's failure to see that counterweights were at all times kept on the dogs caused or contributed to the death of the deceased. They have also found that not having enough men on the tramway

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likewise caused or contributed to the death of the deceased. They have also found that by allowing planks to be thrown off at or near stage-raising the defendant failed to use reasonable precautions for the protection of stage-raisers, but not that it was the cause of the accident. They have said that they are unable to answer whether there was anything negligent either in placing planks upon the tramway or in transmitting them to the place of unloading *or in unloading them.* This, apparently, conflicts with the answer to question 15. They have not expressly found that the negligence of throwing off planks *caused* the death, but have simply found that reasonable precaution would have required that such a system be not adopted. We are, therefore, unable to say that the jury have found any negligence causing the death for which, in our opinion, the defendant, on the evidence, can be said to be liable.

We think that, assuming the tramway to be proper and assuming that the planks are properly placed upon it, and assuming that due care is exercised in unloading the planks, if the plaintiff is able to satisfy the jury by evidence that the defendant reasonably ought to have foreseen that accidents might occur from the throwing off of planks near to the men engaged in stage-raising (even upon the opposite side of the tramway) the defendant would be answerable for such negligence.

It is quite evident that the personal supervision of the work was done by him and he was aware of the method of carrying on the work. See *Sword* v. *Cameron* (1) affirmed in *Smith* v. *Baker* (2). Upon this essential part of the case the learned trial judge charged the jury as follows :

(1) 1 Ct. of Sess. Cas. (2 Ser.) 493. (2) [1891] A. C. 325.

You will bear the fact of the two accidents in your minds throughout the case, if you please, when you are considering what would reasonably be required of the defendant; because he would not have more than a knowledge of the possibility, or probability, as the case may be, of either one of these accidents happening, and *still less would he be likely to have it in his mind that two accidents would be apt to occur at the same moment.* He would in regard to the tramway and the unloading of the lumber from the tramway, I think, and I think any reasonable man would be apt to have in his mind, and the jury would expect him to have in his mind, the possibility of lumber falling from the tramway; but he would not be likely to have in his mind, *nor do I think he ought reasonably to be held likely to have in his mind that the floor upon which that deal would fall would be other than a stage covered bin.* I think it would be expecting a man to foresee possibilities to a greater extent than a jury would be likely to expect him to foresee if they held him to anticipate the occurrence of those two accidents together in the falling of the deal upon the man *when he was in the act of raising staging and when the bin was exposed so that he could go to the bottom.* And I think there have been some references given to his duty in regard to there not having been plank put down if there was a dangerous condition of the bin below, from the fact that it seems *the instructions always forbade the throwing off of lumber from the tramway on to bins where stage-raising was in fact going on.*

We cannot find the evidence went this length but point to it as shewing that the attention of the jury was not closely drawn to what we conceive to be the vital point in issue.

We are unable to say what the evidence may be upon a new trial, but we think that the jury should be made clearly to understand that no matter how perfect the system be, if the defendant, as a reasonable man, should have apprehended that the method adopted in carrying out the system might lead to an accident under particular circumstances, he is liable if the accident occurs under those circumstances. We do not think that the jury's mind should be distracted and embarrassed by questions relating to the different methods of the system of stage-raising; it is common to both systems that at some particular moment the men should be engaged in stage-raising, and the point to be determined is whether or not the defendant was negli-

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gent in allowing planks to be thrown off in the way this plank was thrown off at such a time and place, no matter how carefully the operation is carried on. If there is no evidence whatever from which a jury might infer that such a contingency ought reasonably to have been apprehended by the defendant, then the trial judge would probably think that there was no evidence to go before the jury under the doctrines enunciated by this court in *Wood* v. *The Canadian Pacific Railway Co.* (1), following the authorities therein referred to.

We would suggest that, upon a new trial, the jury be simply asked :—Was the defendant guilty of negligence causing the death of deceased, and if so, in what did such negligence consist ?

We regret the necessity of a new trial and that the appeal must be allowed and with costs, as we feel that any other order as to costs would be a departure from principle and laying down a dangerous precedent.

IDINGTON J. (dissenting).—The appellant in erecting an elevator which had reached at the time when the accident now in question happened about sixty-five feet in height, used for the purpose of the distribution of the planks needed in the construction of the elevator, a system of rollers two feet long set transversely across a tramway that extended four inches beyond the ends of the rollers.

This tramway extended alongside the range of bins that were being made of various sizes from four by eight to twelve by fourteen feet, or some such sizes. These bins were built open from the bottom clear to the top. The planks used to form the sides of these bins were being nailed together by a large number of men. The men engaged in nailing together the planks forming these bins stood upon a stage set in each bin.

(1) 30 Can. S. C. R. 110.

This stage was from time to time as building progressed moved up by four men standing on the wall of the bin, each pulling a rope attached to the stage at or near the corner of it and, as it was drawn up, there was an appliance called a dog that fell, or was intended to fall, into a notch in the wall of the bin and support the stage when it had reached the point where the men needed it set to proceed with the work.

The plaintiff's husband, whilst engaged in the moving of this stage in the manner I refer to, was struck by a plank falling from the tramway which would be some few feet above where he stood, and by force of the blow knocked into the bin and thrown to the bottom along with another workman who was trying to fix one of the dogs needed for the support of this stage. The plaintiff's husband, as the result of this fall of sixty-five feet, was killed.

It seems he had been kept standing in this strained position for a longer time than he need otherwise have been had the dog been at hand to be put into its place. It had dropped off as it was apt to do and time was lost recovering it. As it happened to have been recovered and got back to the place where the man placing it was engaged in doing so, I do not just now attach the importance to the question of its falling out that seems to have been done at the trial by all parties.

Suffice it to say that it became the duty of the deceased in the course of his serving the defendant to help to hold this movable staging and to stand, whilst doing so, in the perilous place he did, on top of a narrow wall sixty-five feet high.

He was entitled in law at the hands of the defendant in the discharge of so risky a duty to the reasonable safeguards that a prudent careful man under the circumstances must have seen necessary for the purpose of protecting one of his servants so placed.

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It seems that the tramway might be seven feet above the workmen at one time and again only three or four feet above them, that height depending entirely upon the progress of the work of construction. Upon this tramway a man would place the needed planks when elevated, and so place them that there might be three tiers alongside each other, consisting of seven two-inch planks in depth.

Thus piled they could be moved along upon and by means of the rollers to the point needed. There would be three of these piles in succession, and propelling one after the other would bring their ends into contact and, if much force directly applied or acquired from momentum of motion, might crowd them upon each other so as to overlap or interlap each other.

When this happened as there was only one man working at throwing off the load he might, though working with care, disturb these planks on the load beyond where he was working.

The act of moving these piles would also sometimes disintegrate the load and tend to throw it or part of it off on the men below.

Any disturbance of these planks was liable to produce a fall of some of them.

That fall might take place just at the unfortunate moment when the men engaged in raising the stage had their hands full and stood in the place of greatest danger in prosecuting their work.

The evidence shows that within two weeks prior to the accident in question planks falling from these piles on the tramway had knocked down two different men engaged beside and below the material thus piled from which such falling took place, and at least on three other occasions there were observed similar occurrences of falling planks.

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All this was apparently not due to carelessness but would seem to have been a necessary incident of operating the narrow, unguarded appliances in use for distributing this timber, and was something one would say who had never seen similar appliances in operation as most likely to happen. Operated a few feet from the ground, it was not likely to produce serious results. Indeed, when the staging was in its place and the men had that to stand upon and a chance to protect themselves, fatal accidents might seem improbable. But when known to happen or to be likely to happen, the question arises if in running the chance of its doing so, at such a critical moment as that now in question, can be aught but negligence on the defendant's part.

It has been established by the evidence of the defendant and his witnesses that this system and these appliances were in charge of most careful men, warned to take every care for the safety of themselves and others, and yet there happened in the operation of this system and these appliances so guarded, within a fortnight or so preceding the accident in question, five different accidents of the same nature as this in so far as lumber falling off from this tram is concerned upon men at work or in the immediate vicinity of the men at work but so placed as to escape the like misfortune of deceased at the time of this the sixth falling of lumber from the tram piles.

If that could happen then and there under such circumstances, I think beyond any question that there was such a condition of things then existing in the defendant's works where deceased was employed as might, and in the language used in this court in *Wood* v. *The Canadian Pacific Railway Co.* (1)

(1) 30 Can. S. C. R. 110.

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could, reasonably have been foreseen to be likely to endanger the safety of the defendant's servants working under or beside such tramway whilst in use where such servants were working.

Then there is evidence in express terms that there might have been more precaution taken and that there was no proper care taken; that lumber had been known to fall from cars when in use in defendant's service, on the tramway, and that the almost self-evident safeguards of outriggers involving a trifling expense might have been applied but was not, and that there could have been greater safety by use of two men instead of one, and that the defendant not only insisted upon one man doing the work of two or where two might have been employed but also pressed the one so much as to induce hasty action, adding thus to the perils of the men by increasing risk of lumber falling off and that if there was undue haste on Humphrey's part it was the act of the defendant who directed it.

I am not concerned beyond the determination of the question whether or not there existed such evidence of this danger and of the neglect to provide against it as to render it the duty of the trial judge to submit the evidence to the jury, the proper tribunal to pass upon it. If I cannot find that, by reason of this evidence falling short of that, the action should have been dismissed, I am in law bound by the verdict of the jury.

This is elementary law—it needs no argument to uphold it.

There was no objection made at the trial to the learned judge's charge or any of his questions that he submitted or to the number thereof. None can be made now.

The only remaining question is what is the meaning of the verdict? Is there enough in it to entitle the plaintiff to have judgment?

They find that the plank which struck the deceased fell from the load next to one Humphreys was handling and directly over the bin where the men were raising the stage and attributable to Humphreys's throwing off the plank, and answer questions Nos. 11, 12, 13, 14, 15, 16, 17, 18 and 19, as follows:—

11. Assuming the appliances to be all that reasonable precaution for the stage-raisers safety would require, did the method or system of using those appliances protect the stage-raisers at the time of the stage-raising, that is to say, take all reasonable precaution for their safety ?

A. No.

12. Would reasonable precaution for the safety of the stage-raisers require that in the distribution of the lumber there should be no handing down or throwing of plank from off the tramway opposite or in close proximity to bins where and when stage-raising was going on, or not, having regard to the work to be accomplished and other existing conditions and circumstances ?

A. Yes.

13. Would reasonable precaution for the stage-raisers' safety while stage-raising, permit of the handing down or throwing of lumber from off the tramway opposite or in close proximity to bins where stage-raising was going on, the handing down or throwing being to the other side of the tramway from that on which the stage-raising was going on, if due care was exercised in the handing down or throwing off, having regard to the work to be accomplished and the existing conditions and circumstances ?

A. No.

14. Did the defendant employ a sufficient number of men for the proper performance of the work in its various departments or branches? If not, in what respect was he negligent therein, and did such negligence cause or contribute to the death of deceased Harris ; and, if so, how ?

A. No, by not having enough men on tramway.

15. Did the defendant use all reasonable precautions for the protection of the stage-raisers ? if not, in what respect did he fail to do so ?

A. No. By allowing plank to be thrown off at or near stage-raising.

16. Did the defendant take reasonable care to provide proper appliances and so to carry on his operations as not to subject those employed by him to unnecessary risk ?

A. No, 6. Yes, 1.

17. *If you answer "No" to the last question, then was there want of reasonable care in not providing proper appliances, or in carrytng on his operations, or both? Was it through such want of reasonable care that the accident occurred o the deceased by which he lost his life ?*

A. It was. Yes, 6. No, 1.

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18. Were the several men employed by the defendant in their respective positions, so far as was reasonably necessary, experienced or instructed for the duties they had to perform? If not, in what respect was the defendant negligent therein, and did such negligence cause or contribute to the death of the deceased Harris, and, if so, how?

A. Yes. The men were experienced, but not sufficiently instructed.

19. Did the defendant personally control and direct the method of using the appliances, to the extent of authorizing the throwing lumber off the tramway opposite or in close proximity to the stage-raisers when at work stage-raising, and to the other side of the tramway?

A. Yes.

I am unable to see any difficulty in understanding what the jury intended by these answers when I bear in mind, as I must, the subject matter in relation to which they were asked, the evidence given and the learned judge's charge thereon to which no objection was taken and that counsel for defendant made no objection to any of these questions. There was and is no manner of doubt that deceased met his death by reason of the falling from the tramway of a plank, that knocked him and his comrade, whilst engaged in stage-raising, down into a pit sixty-five feet deep.

The questions Nos. 16 and 17 and answers thereto would alone be sufficiently comprehensive and accurate, under the circumstances, to convey to the mind of the court that the deceased met his death by reason of the defendant not taking reasonable care to provide proper appliances and carry on therewith his operations in which his late servant was engaged; and the answer to the 19th question attributes this to the defendant personally or as done under his personal control and direction.

An over-refinement in framing so many questions may seem at first sight perplexing. In the answers that the jury have given I think they shew clearly that they successfully overcame everything that was thus so apparently perplexing, and made their meaning clear in spite thereof. I do not think that we should,

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by over-refining, fritter away their plain meaning. It is much more clearly shewn, I submit, than in some other verdicts such as *Moore* v. *The Connecticut Mutual Life Insurance Co.* (1); *Balfour* v. *The Toronto Railway Co.* (2); *Seaton* v. *Burnand* (3); and *O'Connor* v. *The Hamilton Bridge Co.* (4), where verdicts had to be extracted from some apparently inconsistent or inconclusive answers and yet were upheld in most of these instances by this court.

Counsel for the defendant, in opening his defence, said, referring to the contentions by counsel for plaintiff: "He says that the defendant is guilty of negligence in that he did not supply or provide a suitable or safe tramway—in other words a perfect system of tramway. He says that the defendant is guilty of negligence in that he did not provide a safe and secure system of staging; and the third allegation is that he is guilty of negligence in that the method of operating the said system was defective. I may say to you that if the plaintiff could establish—could substantiate these allegations, then I apprehend that we could not very well ask you to do other than bring in a verdict for the plaintiff."

The jury have, upon the evidence which was upon each of these issues sufficient to entitle them to do so, found each of the allegations in question well founded, and yet we are asked to grant a new trial.

The issue as to the safe and secure system of staging I have not dealt with separately though questions were submitted in regard to it and were answered favourably to the plaintiff.

The security and safety of that system is covered sufficiently for the purposes of the trial in question by those answers I have quoted.

(1) 6 Can. S. C. R. 634.
(2) 32 Can. S. C. R. 239; 2 Can. Rway Cas. 325 at p. 327.
(3) 16 Times L. R. 232.
(4) 21 Ont. App. R. 596.

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Much more than need have been, I think, was gone into at the trial on this head but possibly the doing so was unavoidable, and certainly the defendant cannot say after (so to speak), joining issue thereon in the address I have quoted from, that he was embarrassed by it.

I think the appeal should be dismissed with costs.

Appeal allowed with costs.

Solicitors for the appellant: *Blair & Blair.*

Solicitor for the respondent: *Daniel Mullin.*